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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ARTHUR CALDERON, Warden, *Petitioner*,

v.

HORACE EDWARDS KELLY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX 1

APPENDIX 1

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

HORACE EDWARDS KELLY, Petitioner

v.

DANIEL VASQUEZ, etc., Respondent

Order - filed June 17, 1997

Case Nos. CV 93-2951 TJH and CV 92-5420 TJH

The Court has considered Respondent's motion to dismiss and vacate the stays of execution and Petitioner's motion to avoid the petition filing deadline, to determine the applicability of the Antiterrorism and Effective Death Penalty Act of 1996, for sanity hearing, and for an indefinite stay of execution, together with the moving papers.

It is Ordered that Respondent's motion to dismiss and vacate the stays of execution be, and hereby is, Denied.

It is further Ordered that the filing deadlines of the Antiterrorism and Effective Death Penalty Act of 1996 do not apply to this case.

It is further Ordered that Petitioner's motion for a sanity hearing shall be deemed a motion for a competency hearing.

It is further Ordered that Petitioner's motion for a competency hearing be, and hereby is Granted.

It is further Ordered that the competency hearing shall be held at 9:30 a.m. on Friday, October 10, 1997, at San Quentin State Prison.

It is further Ordered that Dr. David Kessler shall appear at the competency hearing as the Court's expert.

Date: June 17, 1997

/s/
Terry J. Hatter, Jr.
United States District Judge

APPENDIX 2

APPENDIX 2

Arthur CALDERON, Warden, Warden of California State Prison at San Quentin,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

Horace Edwards Kelly, Real Party in Interest.

No. 97-70785.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 5, 1997.

Decided Sept. 18, 1997.

After the United States District Court for the Central District of California denied state's motion to dismiss state inmate's pre-habeas petition proceedings, state sought writ of mandamus. The Court of Appeals, Fernandez, Circuit Judge, held that: (1) statute of limitations under Antiterrorism and Effective Death Penalty Act (AEDPA) was applicable despite inmate's pre-AEDPA request for counsel, and (2) statute of limitations was not tolled by inmate's alleged mental incompetence.

Granted.

Tashima, Circuit Judge, dissented in part and filed opinion.

[1] MANDAMUS k4(1)
250k4(1)
Upon request to issue writ of mandamus in habeas corpus action, Court of Appeals considers whether party seeking writ has no other adequate means, such as direct appeal, to attain relief he desires, whether petitioner will be damaged or prejudiced in way that is not correctable on appeal, whether district court's order is clearly erroneous as matter of law, whether district court's order is oft repeated error or manifests persistent disregard for federal rules, and whether district court's order raises new and important problems or issues of law of first impression.

[1] MANDAMUS k60
250k60
Upon request to issue writ of mandamus in habeas corpus action, Court of Appeals considers whether party seeking writ has no other adequate means, such as direct appeal, to attain relief he desires, whether petitioner will be damaged or prejudiced in way that is not correctable on appeal, whether district court's order is clearly erroneous as matter of law, whether district court's order is oft repeated error or manifests persistent disregard for federal rules, and whether district court's order raises new and important problems or issues of law of first impression.

[2] HABEAS CORPUS k205
197k205
Any application by state inmate for habeas corpus would be subject to one-year statute of limitations for filing such applications, under Antiterrorism and Effective Death Penalty Act (AEDPA), even though inmate requested

counsel to assist with application for habeas corpus prior to AEDPA's effective date. 28 U.S.C.A. § 2244(d)(1)(A).

[3] HABEAS CORPUS k603
197k603
One-year statute of limitations for filing habeas corpus applications, under Antiterrorism and Effective Death Penalty Act (AEDPA), was not tolled by state inmate's alleged mental incompetence. 28 U.S.C.A. § 2244(d)(1)(A).

***782** Keith I. Motley, Deputy Attorney General, San Diego, CA, for petitioner and respondent.

Eugene R. Grace, Grace, Genson, Cosgrove & Schirm, Los Angeles, CA, and Richard C. Neuhoff, San Francisco, CA, for Real Party in Interest.

Petition for a Writ of Mandamus to the United States District Court for the Central District of California. D.C. Nos. CV-92-05420-TJH, CV-93-02951-TJH.

Before: HALL, FERNANDEZ, and TASHIMA, Circuit Judges.

FERNANDEZ, Circuit Judge:

The State of California, through the Warden of the California State Prison at San Quentin, moved to dismiss the proceedings in the United States District Court, which were filed on behalf of Horace Edwards Kelly. ***783** The State claimed that the Antiterrorism and Effective Death Penalty Act's one-year statute of limitations for filing applications for a writ of habeas corpus precluded the continuance of the proceedings. See 28 U.S.C. § 2244(d)(1). The district court declared that the filing deadlines of the AEDPA did not apply to this matter and

denied the motion. This petition for a writ of mandamus followed. We agree with the State and order the writ to issue.

BACKGROUND

Way over ten years ago, Kelly murdered three people in three separate incidents. On November 16, 1984, he slew Sonia Reed in San Bernardino County, California, and he followed up that deed by slaying Ursula Houser on November 17, 1984, in the same county. He then shifted his facinorous operations, and on November 22, 1984, he took the life of an eleven-year-old boy, Danny O., in Riverside County, California. He was convicted and sentenced to death for Danny O.'s murder, and on November 26, 1990, the conviction and sentence was upheld by the California Supreme Court. See People v. Kelly, 51 Cal.3d 931, 800 P.2d 516, 275 Cal.Rptr. 160 (1990), cert. denied, 502 U.S. 842, 112 S.Ct. 134, 116 L.Ed.2d 101 (1991) (Kelly I). He was also convicted and sentenced to death for the murders of Sonia Reed and Ursula Houser, and on January 16, 1992, that conviction and sentence was upheld by the California Supreme Court. See People v. Kelly, 1 Cal.4th 495, 822 P.2d 385, 3 Cal.Rptr.2d 677, cert. denied, 506 U.S. 881, 113 S.Ct. 232, 121 L.Ed.2d 168 (1992) (Kelly II). He did not seek further relief in the state court system, and that is where his federal court saga begins.

A didactic saga it is. Kelly has never filed an application or petition for habeas corpus relief in the federal courts and has never, therefore, stated any colorable grounds for the issuance of the Great Writ. Rather, he has been permitted to take advantage of a judicially created rule which enables an allegedly prospective federal habeas corpus petitioner to start a "proceeding" for the purpose of obtaining federally appointed counsel before any application or petition for habeas corpus is filed. That proceeding then allows the district court to "enter a stay of execution" on the theory that a petitioner has the right to counsel, and "the right to counsel necessarily includes

a right for that counsel meaningfully to research and present a defendant's habeas claims." McFarland v. Scott, 512 U.S. 849, 858, 114 S.Ct. 2568, 2573, 129 L.Ed.2d 666 (1994); see also Brown v. Vasquez, 952 F.2d 1164, 1168-69 (9th Cir.1992).

It should be observed that, in McFarland, four justices expressed disquiet at the fact that state proceedings could be interfered with and stayed before a defendant was even required to present a colorable claim to the federal courts. See McFarland, 512 U.S. at 860-61, 114 S.Ct. at 2574-75 (O'Connor, J., concurring and dissenting); id. at 873, 114 S.Ct. at 2581 (Thomas, J., joined by Rehnquist, C.J. and Scalia, J., dissenting). That is precisely what has happened here, but this case adds still another dimension to the problem, interminable delay.

On September 8, 1992, the district court granted a stay of Kelly's execution for the murder of Danny O., so that counsel could be appointed for him. Counsel was appointed January 15, 1993. Then, on June 4, 1993, the district court granted a stay of Kelly's execution for the murders of Sonia Reed and Ursula Houser and appointed counsel. Now, more than four years after the grants of those stays, there still has been no filing of a habeas corpus application, and there would be no end in sight unless the AEDPA has brought the proceedings to a close. There have, however, been other orders issued. On January 9, 1995, the district court appointed a psychiatrist to evaluate Kelly's present mental condition. Of course, Kelly's mental condition has been an issue since the beginning of the state proceedings against him. See, e.g., Kelly II, 1 Cal.4th at 514, 541, 543, 822 P.2d at 392, 411, 412, 3 Cal.Rptr.2d at 684-85, 703, 704; Kelly I, 51 Cal.3d at 944, 800 P.2d at 523, 275 Cal.Rptr. at 167. Then on January 5, 1996, the district court appointed a "next friend" to bring a habeas corpus petition on Kelly's behalf.

That is another method for assuring that a defendant obtains prompt review of federal constitutional *784 questions on habeas corpus. See Whitmore v. Arkansas, 495 U.S. 149, 161-64, 110 S.Ct. 1717, 1726-28, 109 L.Ed.2d 135 (1990). Still, no habeas corpus application or petition was filed.

The AEDPA was enacted April 24, 1996, and it, as relevant here, provided that an application for a writ of habeas corpus must be filed within one year of "the date on which the [state court] judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). It is clear that we are now far beyond that one-year period, but we have held that, in justice, the one year would not begin to run until the date the AEDPA was enacted. See Calderon v. United States Dist. Court (Beeler), 112 F.3d 386, 389 (9th Cir.1997). That year has passed. Still, no application for habeas corpus has been filed.

Faced with the delay, and with no end in sight, the State filed a motion to dismiss both proceedings and to vacate the stays of execution because the one- year statute of limitations had passed. The district court, without revealing its reasoning, declared that the AEDPA's filing deadlines do not apply to this matter. This petition for a writ of mandamus followed.

DISCUSSION

[1] When we are asked to issue a writ of mandamus in a habeas corpus action, we apply the guidelines articulated and discussed in Bauman v. United States Dist. Court, 557 F.2d 650, 654-55 (9th Cir.1977). Those are:

(1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he desires;

(2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;
(3) whether the district court's order is clearly erroneous as a matter of law;
(4) whether the district court's order is an oft repeated error or manifests persistent disregard for the federal rules; and
(5) whether the district court's order raises new and important problems or issues of law of first impression.

Beeler, 112 F.3d at 388 (citations omitted). Of course, we have recognized that these are guidelines, that they "do not always result in bright-line distinctions," and that a decision "will often require a balancing of conflicting indicators." Bauman, 557 F.2d at 655. Nevertheless, as we have said, "[a]lthough all five factors need not be satisfied, 'it is clear that the third factor, the existence of clear error as a matter of law, is dispositive.'" Calderon v. United States Dist. Court (Nicolaus), 98 F.3d 1102, 1105 (9th Cir.1996), cert. denied, --- U.S. ----, 117 S.Ct. 1830, 137 L.Ed.2d 1036 (1997) (citation omitted); see also Calderon v. United States Dist. Court (Hayes), 103 F.3d 72, 74 (9th Cir.1996), cert. denied, --- U.S. ----, 117 S.Ct. 2532, 138 L.Ed.2d 1031 (1997).

Here at least most of the guidelines point toward the propriety of issuing the writ. The first because it is plain that if the writ is not issued, the State will be forced to await the outcome of proceedings which should not go forward at all, and which may well extend the four to five years' delay much further. Indeed, they probably will do so, considering the fact that the only excuse for not having filed an application or petition for a writ of habeas corpus is said to be Kelly's mental state, an issue which has been around for over ten years.

The second is satisfied because the very harm the State will suffer is an even longer interference in its proceedings

without the benefit of a habeas corpus application to explicate any alleged federal claims.

The fourth guideline does not clearly point in favor of issuing the writ because we are not in a position to say that the error in question is oft repeated. However, that segues into the fifth guideline because the issue of the proper application of the AEDPA is exceedingly important and is one of first impression. It must be answered promptly lest errors and disruptions of state proceedings proliferate. Also, other petitioners may be misled as to their rights. See Beeler, 112 F.3d at 388.

*785 On balance, the third guideline will, indeed, be dispositive. Thus, we turn to the merits of the State's position regarding the AEDPA.

A. Statute of Limitations

[2] The State's position is simple and direct. It points to the statute, which clearly requires that the "application for a writ of habeas corpus" must be filed during the one-year statute of limitations period. 28 U.S.C. § 2244(d)(1)(A). The statute does not say that a request for counsel must be filed during that time; it requires the filing of the application itself. It is abundantly clear that no application for habeas corpus has ever been filed in these matters. No doubt some sort of proceedings, which might ultimately have led to applications, were on file. But a mere possibility that a habeas corpus application will be filed is far from being the habeas corpus application itself.

We made that clear when we declared that even after counsel had been appointed and a stay had been entered, the defendant had no right to obtain discovery. That was not available before the habeas corpus application (or petition) was itself filed. See Nicolaus, 98 F.3d at 1108.

In Nicolaus, we outlined many of the separate concerns that make pre-application proceedings different from the habeas corpus case itself. Among other things, there is not even an inkling that there is any valid ground for filing a habeas corpus application before one is filed. Id. at 1106. In the context of this proceeding, for example, matters have dragged on with no articulated basis for having the federal court involved.

But, says Kelly, despite the clear language of § 2244(d)(1), the AEDPA does not apply at all because it only applies to cases filed after April 24, 1996, and his case was filed before that date. We disagree. As we have said, the AEDPA applies to defendants who "did not have a federal habeas petition pending at the time AEDPA was signed into law." Beeler, 112 F.3d at 390 n. 3.

Kelly does get some succor from statements in cases which did not focus on the distinction between situations where an application or petition was pending and those where one was not. Thus, when we determined the retroactivity of the AEDPA we did repeatedly refer to the issue as involving one of "pending cases." Jeffries v. Wood, 114 F.3d 1484, 1493-98 (9th Cir.1997) (en banc) (emphasis added). In stating our conclusion, we declared that the Act, as relevant here, did not apply to "cases filed in the federal courts of this Circuit prior to the Act's effective date." Id. at 1499. Kelly, of course, now argues that his case was so filed. But he ignores our illumination of what we meant, which appears in the very next sentence: "Because Jeffries' habeas petition was filed prior to April 24, 1996, the Act does not apply to his case." Id. (emphasis added). Just so, but Kelly has never filed a petition or application.

Kelly also points to the Supreme Court's decision in Lindh v. Murphy, --- U.S. ----, 117 S.Ct. 2059, 138 L.Ed.2d 481

(1997), but that case offers him precious little help. That is because the Court framed the issue before it as "whether that new section of the statute [2254(d)] dealing with petitions for habeas corpus governs applications in non-capital cases that were already pending when the Act was passed." Id. at ----, 117 S.Ct. at 2061 (emphasis added). Lindh had filed his application for the writ long before the effective date of the Act. Thus, the provisions did not apply to him. Again, while the court repeatedly referred to "cases," the context of that reference was matters where a habeas corpus application was on file.

Were there any doubt about this reading, it is dispelled by Congress's obvious intent to "'halt the unacceptable delay which has developed in the federal habeas process.'" Beeler, 112 F.3d at 391. Whether one believes that the delay is unacceptable, or not, the rule argued for by Kelly would seriously undercut Congress's purpose, as this matter itself illustrates. Over four years after he first obtained stays from the district court, Kelly has yet to present any application for habeas corpus to that court. If a mere appointment of counsel in what amounts to a proceeding ancillary to a true habeas corpus application can avoid the one-year statute of limitations, the Act will not have been very effective at all.

***786** B. Tolling

[3] Kelly argues that even if the AEDPA does apply, he is entitled to tolling of the one-year provision. We have held that equitable tolling will be available when "'extraordinary circumstances' beyond a prisoner's control make it impossible to file a petition on time." Beeler, 112 F.3d at 391; see also Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir.1996); Scholar v. Pacific Bell, 963 F.2d 264, 267-68 (9th Cir.), cert. denied, 506 U.S. 868, 113 S.Ct. 196, 121 L.Ed.2d 139 (1992).

Kelly asserts that he is not mentally competent and cannot, therefore, aid his attorney. Thus, he argues, he not only is entitled to tolling but also is entitled to have the stays imposed by the district court continued indefinitely. He cites no authority for that interesting assertion, and on the facts of these proceedings we reject it as a matter of law. When Kelly was before the California Supreme Court, he made the same argument in an attempt to forestall the whole state appellate process. That court responded:

Defendant contends that his right to "meaningful appellate review" and right to the effective assistance of counsel under the state and federal Constitutions preclude proceeding with the appeal if he is incompetent. We disagree. The United States Supreme Court has not specifically decided this question, but has done so by implication. In Whitmore v. Arkansas (1990), 495 U.S. 149, 110 S.Ct. 1717, 109 L.Ed.2d 135 ..., the high court held that a person has standing to bring a "next friend" challenge to a judgment of death only in limited circumstances. A "next friend" must show "that the real party in interest is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability." (Id. at p. 165 [110 S.Ct. at p. 1728] ..., italics added.) The emphasized language implies that mental incompetence, although a basis for allowing "next friend" standing to challenge the judgment, does not require cessation of postjudgment proceedings. Here, of course, "next friend" status is unnecessary, since defendant is fully represented by counsel who can protect his interests.

....

The considerations that prohibit an incompetent person from being tried ..., do not apply after the judgment. The issues on appeal are limited to the appellate record. An appeal involves only legal issues based on that record. Attorneys do not need to rely on the defendant himself to decide what issues are worthy of pursuit.

Kelly II, 1 Cal.4th at 545-46, 822 P.2d at 413-14, 3 Cal.Rptr.2d at 705-06 (citations omitted). We fully agree. Here, too, Kelly has had counsel to represent him for a long time, and even has a next friend. The Supreme Court could hardly have contemplated that all post-conviction proceedings would be stayed because a defendant was not competent, when it endorsed the concept which allows "'next friends' [to] appear in court on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves." Whitmore v. Arkansas, 495 U.S. at 162, 110 S.Ct. at 1726. Nor is Rees v. Peyton, 384 U.S. 312, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966), on which Kelly relies, to the contrary. The Court merely retained jurisdiction over an already filed petition until it could be determined whether the petitioner was competent to withdraw the petition. Id. at 314, 86 S.Ct. at 1506-07. The Court did not suggest that any ensuing determination of incompetence would stay action on the merits of that petition.

While we do not foreclose the possibility that some particular difficulties could require tolling in some instances, this is not one of them. This matter stands in essentially the same posture that it stood in when it was before the California Supreme Court. Because once his direct appeals were decided Kelly did not request any further relief from the California courts, he cannot, generally speaking, pursue any issues in the federal courts which were not before the California Supreme Court when it decided those appeals. Any other purported claims would be unexhausted. See Duncan v. Henry, 513 U.S. 364, 365, 115 S.Ct. 887, 888, 130 L.Ed.2d 865 (1995); Picard v. Connor, 404 U.S. 270, ***787** 277-78, 92 S.Ct. 509, 513, 30 L.Ed.2d 438 (1971) [FN1]. Kelly is simply attempting to obtain from the federal courts, by indirection, the very relief he was denied on direct appeal

in California. He seeks to put off any decision whatever on the merits of his claims, if any. That he cannot do under the guise of tolling or otherwise. [FN2] As it is, he has injected a long, fruitless delay into the state proceedings. The AEDPA has, however, brought that delay to an end.

> FN1. Under the AEDPA, exhaustion is not waived unless "the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3). That is a highly unlikely event.
>
> FN2. Despite the dissent's allusion to the district court's order of January 6, 1995, there is not the slightest hint that the order was intended to, or did, preclude the filing of a habeas corpus application by Kelly. That is underscored by the fact that he does not argue that the order had that effect.

Of course, if Kelly's real point is that a presently incompetent person should not be executed, that claim is premature. It can only be brought up if and when an order for his execution issues. In that event, California does recognize that it cannot execute an insane person. See Kelly II, 1 Cal.4th at 544, 822 P.2d at 413, 3 Cal.Rptr.2d at 705. It provides a procedure for turning the order of execution aside. See Cal.Penal Code §§ 3700-3706. Moreover, Kelly could seek relief in the federal courts. See Martinez- Villareal v. Stewart, 118 F.3d 628, 633-34 (9th Cir.1997).

CONCLUSION

Kelly desires to turn the procedure for obtaining counsel before an application for habeas corpus is filed into a source of sempiternal delay of all state and federal proceedings against him. Before the AEDPA, that

strategy had prospects for success. In fact, he has obtained a delay of all proceedings regarding his convictions for well over four years. However, although represented by counsel and a next friend, he did not file his application for habeas corpus within one year after the passage of the AEDPA. It is now too late.

Therefore, we order the issuance of a writ of mandamus which directs the lifting of the stays of execution in United States District Court, Central District of California, Cases No. CV-92-05420-TJH and No. CV-93-02951-TJH, and which further directs the dismissal of those matters forthwith.

The petition for a writ of mandamus is GRANTED.

TASHIMA, Circuit Judge, dissenting in part:

I agree with the majority that because real party in interest Kelly had not filed a habeas corpus petition by April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Chapter 153 of the AEDPA, including the newly-enacted statute of limitations for habeas petitions, 28 U.S.C. § 2254(d)(1), applies to him. See Lindh v. Murphy, --- U.S. ----, ----, ----, 117 S.Ct. 2059, 2061, 2069, 138 L.Ed.2d 481 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir.1997) (en banc). However, I cannot agree that this case does not present the "extraordinary circumstances" entitling Kelly to the tolling of the AEDPA's statute of limitations. I therefore respectfully dissent from Part B of the majority opinion and from the judgment.

In my view, this case is squarely controlled by Calderon v. United States Dist. Court, 112 F.3d 386 (9th Cir.1997) (Beeler). In Beeler, we first held that § 2254(d)(1) was a statute of limitations and not a jurisdictional provision;

thus, that it was subject to equitable tolling. Id. at 390-91. We then described the few cases which would be eligible for equitable tolling: "Equitable tolling will not be available in most cases, as extensions of time will only be granted if 'extraordinary circumstances' beyond the prisoner's control make it impossible to file a petition on time." Id. at 391 (quoting Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir.1997)). Finally, we held that the withdrawal of an attorney, who was aiding a putative habeas petitioner to prepare his petition, whose work product was "not usable" by replacement counsel, qualified as "extraordinary circumstances" *788 which justified tolling the statute of limitations. Id. at 391-92.

Here, unfortunately, the district court's order is not as clear as it could have been. Its operative provision, without any explanation or analysis, states tersely: "It is further Ordered that the filing deadlines of the Antiterrorism and Effective Death Penalty Act of 1996 do not apply to this case." However, "[w]e may affirm on any ground supported by the record even if it differs from the rationale of the district court." Martinez-Villareal v. Lewis, 80 F.3d 1301, 1305 (9th Cir.), cert. denied, --- U.S. ----, 117 S.Ct. 588, 136 L.Ed.2d 517 (1996).

The record supports that Kelly has been having serious mental problems for many, many years. The State does not contend otherwise. [FN1] In recognition of this fact, the district court has set a hearing to determine Kelly's mental competency. Thus, a fair reading of the district court's order, fully supported by the record, is that it has ordered the AEDPA's statute of limitations to be tolled pending a determination of Kelly's mental competency. What the district court will then decide to do, will obviously depend on the outcome of that hearing.

> FN1. A 1995 examining psychiatrist's report concludes, in part:
> [B]eginning in January 1990 he [Kelly] has been repeatedly diagnosed as suffering from a psychotic disorder, with such symptoms as delusions, hallucination, inappropriate affect, social withdrawal, bizarreness, fragmentation of thinking, and incoherence. As recently as August 1992 several members of the psychiatric staff at San Quentin evaluated the Petitioner, and concluded that they were unable to ascertain that he was sane.
> The report further concluded:
> [H]e is now suffering form [sic.] a psychotic mental disorder of such severity that it precludes his capacity to appreciate his current legal position and make rational choices with respect to the current court proceedings.

Beeler held that the additional time required by new counsel (although there is no constitutional right to counsel in a habeas proceeding) to prepare a habeas petition was an "extraordinary circumstance" which tolled the statute. It defies logic and is contrary to the holding of Beeler to hold, as the majority does, that proceedings to determine a putative habeas petitioner's own incompetency (a petitioner who has no right to counsel) is not an "extraordinary circumstance."

The majority reaches its Draconian result-precluding Kelly from ever filing a first federal petition-by misreading the record, misapplying the law and defying our own binding precedent.

It is true, as the majority emphasizes, that these proceedings have been pending for several years. [FN2] However, it is evident from the record that most of the

delay has been caused by the district court's attempts to grapple with Kelly's mental problems. Moreover, what the majority overlooks is that, on January 9, 1995, as part of its order that Kelly be mentally evaluated and that a mental evaluation report be filed, the district court ordered "that all other aspects of this case be, and hereby are, Stayed pending a final determination by this Court of the Petitioner's mental capacity to proceed." That stay has never been lifted and Kelly's mental capacity has never been determined. [FN3] Thus, for Kelly's counsel to proceed with the filing of a petition at any time after January 9, 1995, as the majority intimates they should have, would have been in direct violation of the stay. [FN4] Few things put the doing of an act so "clearly beyond the prisoner's control," as Beeler requires, as a court order prohibiting the doing of that act.

FN2. Most of this time, of course, was before the AEDPA became effective, when there was no statute of limitations for habeas petitions.

FN3. Unable to dispute that the district court has imposed such a stay and that it is still in effect, the majority falls back on the perplexing argument that, despite its plain meaning, the district court's order does not mean what it says. Unfortunately, the parties are unable so easily to ignore the order's plain meaning and the record demonstrates that they have abided by the stay.

FN4. A habeas petition is also required to be verified personally by the petitioner, Rule 2(c), Rules Governing § 2254 Cases in the U.S. Dist. Courts ("The petition ... shall be signed under penalty of perjury by the petitioner."), a requirement which the district court has not yet determined that Kelly is able to fulfill.

Even the State has recognized that a determination of Kelly's competency is a necessary prerequisite to proceeding further:

> *789 Accordingly, given the fact that the Report [of the evaluating psychiatrist] has raised an issue as to Kelly's incompetence, and because if Kelly is incompetent, his counsel cannot proceed unless a next friend representing Kelly's interests is appointed, this Court should conduct a hearing to determine whether Kelly is in fact incompetent.

Respondent's Position Regarding Dr. Kessler's Report at 16, filed Jun. 26, 1995.

At least by January 9, 1995, when it appointed Dr. David Kessler to evaluate and determine Kelly's mental competency, the district court appreciated that Kelly posed a potential problem in terms of his competency to proceed with the preparation and filing of his federal habeas petition. Dr. Kessler's report was filed with the court within two-and-a-half months, by late March. Thereafter, for reasons not fully explained on the record, the district court did not set a competency hearing until one was requested by Kelly on March 20, 1997. The court granted Kelly's motion, but instead of setting the hearing before the April 24 expiration of the ADEPA's one-year period of limitation, it set the hearing for October 10, 1997, six months later.

In the meantime, apparently in response to the State's position regarding Dr. Kessler's report, the court appointed Kelly's mother as his next friend. However, the circumstances of the appointment make it plain that the purpose of the appointment was to assist Kelly with the competency hearing and nothing more. [FN5] This is necessarily so because a prerequisite to the appointment

of a next friend for the purpose of filing a habeas petition is a finding that the putative petitioner is incompetent to verify and file the petition himself or herself. "In Whitmore v. Arkansas, 495 U.S., at 165, 110 S.Ct., at 1725, we held that 'one necessary condition for "next friend" standing in federal court is a showing by the proposed "next friend" that the real party in interest is unable to litigate his own cause due to mental incapacity.'" Demosthenes v. Baal, 495 U.S. 731, 734, 110 S.Ct. 2223, 2225, 109 L.Ed.2d 762 (1990).

> FN5. The order originally did contain provisions regarding the next friend acting on Kelly's behalf with regard to internal prison matters, but those provisions were deleted by the district court after the State objected.

Because, under Whitmore, "next friend" standing is an Article III jurisdictional requirement, 495 U.S. at 162-64, 110 S.Ct. at 1726-28, where, as here, that showing has not been made, a "next friend" cannot be appointed to prosecute a habeas proceeding. Id. Thus, the record does not support the majority's conclusion that a "next friend" was qualified and available to file a habeas petition on Kelly's behalf, since no determination has yet been made that Kelly "is unable to litigate his own cause due to mental incapacity."

Finally, the majority's reliance on the California Supreme Court's analysis of why incompetency does not prevent a direct appeal from going forward is puzzling. See People v. Kelly, 1 Cal.4th 495, 546, 3 Cal.Rptr.2d 677, 706, 822 P.2d 385, cert. denied, 506 U.S. 881, 113 S.Ct. 232, 121 L.Ed.2d 168 (1992) ("The considerations that prohibit an incompetent person from being tried ... do not apply after the judgment. The issues on appeal are limited to the appellate record. An appeal involves only legal issues

based on that record. Attorneys do not need to rely on the defendant himself to decide what issues are worthy of pursuit.").

Whatever the validity of that reasoning on direct appeal, it has no place in a habeas proceeding. We have said, time and again, that because issues on direct appeal are confined to the record, many potential issues, including, for example, ineffective assistance of counsel claims, cannot be raised on direct appeal, but must be raised by collateral review. E.g., United States v. Houtchens, 926 F.2d 824, 828 (9th Cir.1991). The reason for this insistence is because "habeas proceedings permit the defendant to develop a record of 'what counsel did, why it was done, and what if any, prejudice resulted.'" United States v. Daly, 974 F.2d 1215, 1218 (9th Cir.1992) (citations omitted).

Here, in fact, Kelly did make a claim of ineffective assistance on direct appeal. See Kelly, 1 Cal.4th at 519-23, 3 Cal.Rptr.2d at ***790** 688-90, 822 P.2d 385. Thus, to suggest, by analogy to direct appeal, that a putative habeas petitioner's personal participation is unnecessary to the preparation and prosecution of a habeas petition is simply mistaken. It renders superfluous and meaningless the requirement in the rules, see footnote 4, supra, that the petitioner personally verify the petition.

In sum, the circumstances here which temporarily rendered Kelly unable to file a habeas petition are at least as extraordinary as in Beeler. Kelly may be incompetent to proceed without the assistance of a "next friend." However, whether or not he is, thus qualifying him for such assistance, has not yet been determined by the district court. It is inequitable and unjust to impute to Kelly, as the majority does, the district court's delay in acting on this issue, especially when the court has stayed

all proceedings, except the competency determination. That stay has been in existence during the entire period since the AEDPA has become effective.

As indicated above, the district court has already set a hearing to determine Kelly's competency for October 10. I would hold that § 2254(d)(1)'s one- year period of limitations is tolled, due to extraordinary circumstances, until a reasonable period after the district court makes a prompt determination of whether or not Kelly is competent. If he is competent, he should be given a short, but reasonable period to file his petition. If he is incompetent, a "next friend" to file the petition on his behalf, based on his incompetency, should be appointed and that "next friend," likewise, should be given a short, but reasonable period within which to file a petition on Kelly's behalf.

That Kelly's possible incompetency requires the statute of limitations temporarily to be tolled, is not an undue interference with the State's interest. After all, that interest must be balanced, at least minimally, against a state prisoner's constitutional right to petition for the Great Writ. In these circumstances, I submit that the State's interest in insisting that the proceeding go forward immediately is not entitled to great weight. The State has no interest in executing an insane person. Ford v. Wainwright, 477 U.S. 399, 410, 106 S.Ct. 2595, 2602, 91 L.Ed.2d 335 (1986) ("The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane."). [FN6] Thus, tolling the statute of limitations while Kelly's competency is being determined interferes only minimally with the interest of the State. Consequently, the State's interest in executing the sentence of death is an insufficient reason, contrary to the majority's intimation, not to toll the statute of limitations for a reasonable period of time.

> FN6. Even before Ford v. Wainwright, California had enacted procedures to insure that it does not execute insane persons. See 477 U.S. at 408 n. 2, 106 S.Ct. at 2601 n. 2; see also Cal.Penal Code §§ 3701 (providing procedure to inquire into capital prisoner's sanity), 3703
> (providing for confinement of insane capital prisoner in medical facility until sanity is restored).

The majority errs in focusing its wrath on Kelly's "desires," rather than its analysis on the proper scope to be accorded to the district court's order in light of the record: "Kelly desires to turn the procedure for obtaining counsel before an application for habeas corpus is filed into a source of sempiternal delay of all state and federal proceedings against him." As I have emphasized throughout this dissent, an appropriate tolling period would be far from "sempiternal," but only temporary, until Kelly's competency to proceed has been determined. Thus, the majority posits a false choice: Either Kelly cannot ever be required to file a habeas petition because the statute of limitations will be tolled forever, or the statute cannot be tolled at all and he must be prevented from filing a first federal petition and subjected immediately to an order of execution.

Because I would deny the writ, I respectfully dissent.

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APPENDIX 3

APPENDIX 3

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

HORACE EDWARDS KELLY, Petitioner

v.

DANIEL VASQUEZ, etc., Respondent

Case Nos. CV 93-2951 TJH and CV 92-5420 TJH

Order - Filed February 2, 1998

The Court has received the January 14, 1998, order of the Ninth Circuit Court of Appeals denying the Petitioner's petition for rehearing, rejecting the suggestion for a rehearing en banc, and reinstating the writ of mandate which ordered this Court to lift the stays of execution and to dismiss these cases.

It is further Ordered that, pursuant to the Ninth Circuit's mandate, the stays of execution be, and hereby are, Lifted.

It is further Ordered that, pursuant to the Ninth Circuit's mandate, these cases be, and hereby are, Dismissed.

Date: February 2, 1998

/s/
Terry J. Hatter, Jr.
United States District Judge

APPENDIX 4

APPENDIX 4

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

HORACE EDWARDS KELLY, Petitioner

v.

ARTHUR CALDERON, etc., Respondent

Case Nos. CV 98-2722 TJH and CV 98-2723 TJH

Order - Filed June 3, 1998

The Court has considered Petitioner's motion for equitable tolling, *ex parte* application to shorten time for the motion for leave to file an amended petition, motion for leave to file an amended petition, and motion to stay execution, together with the moving and opposing papers.

It is Ordered that the motion for equitable tolling be, and hereby is, Granted based on prior counsels' reliance on this Court's order staying all proceedings other than the issue of Petitioner's sanity.

It is further Ordered that the *ex parte* application to shorten time for the motion for leave to file an amended petition be, and hereby is, Granted.

It is further Ordered that the motion for leave to file an amended petition be, and hereby is, Granted.

It is further Ordered that the motion to stay Petitioner's execution be, and hereby is, Granted.

It is further Ordered that Petitioner's execution be, and hereby is, Stayed pending a final resolution of his petitions.

Date: June 3, 1998

/s/
Terry J. Hatter, Jr.
Chief United States District Judge

APPENDIX 5

APPENDIX 3

For Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTHUR CALDERON, Warden of California State Prison at San Quentin, Petitioner

v.

THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Respondent

v.

HORACE EDWARDS KELLY, Real Party In Interest

No. 98-70569

D.C. No. CV-98-02722-TJH
No. CV-98-02723-TJH

Opinion

Petition for a Writ of Mandamus to the United States District Court for the Central District of California

Submitted June 9, 1998
Pasadena, California

Filed: June 9, 1998

Before: Cynthia Holcomb Hall, Ferdinand F. Fernandez, and A. Wallace Tashima, Circuit Judges.

Opinion by Judge Fernandez

FERNANDEZ, Circuit Judge:

The State of California, through the Warden of the California State Prison at San Quentin, moved to dismiss the proceedings in the United States District Court, which were filed on behalf of Horace Edwards Kelly. The State claimed that the Anti-Terrorism and Effective Death Penalty Act's one year statute of limitations for filing applications for a writ of habeas corpus precluded the continuance of the proceedings. See 28 U.S.C. § 2244(d)(1). The district court disagreed. We agree with the State, in part, and order the writ to issue.

BACKGROUND

In Calderon v. United States District Court, 127 F.3d 782 (9th Cir. 1997) (Kelly III)[1] we outlined Kelly's murderous background. Thus, we need not repeat that here.

After we ordered the prior proceedings dismissed because they were barred by the AEDPA's statute of limitations, Kelly[2] commenced two new proceedings in the district court, and filed habeas corpus petitions in those proceedings. The State filed motions to dismiss those proceedings because they were in direct contravention of our determination that the statute of limitations barred Kelly from going forward with federal habeas corpus. See id. at 785-87. The district court

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1. We call our prior decision Kelly III because in that case we refer to earlier decisions as Kelly I and Kelly II.

2. More accurately, Kelly's new next friend, the Federal Public Defender, did so on his behalf. We are not asked to determine whether the Federal Public Defender properly insinuated herself into this proceeding. Thus, we do not do so.

denied the motions and declared that the statute of limitations was tolled. This writ petition was filed before the district court made its position explicit, but it has since removed all doubt.

DISCUSSION

The State raises two separate issues. The first is that the district court improperly allowed Kelly's case to rise from the ashes into which it was converted when it became barred by the statute of limitations. The second is that the district court appeared to be allowing Kelly to develop claims which had never been exhausted in the California Supreme Court.

The latter issue appears to have been mostly mooted when the California Supreme Court ruled on the claims in questions on June 2, 1998.[3] However we agree with the State that to the extent that Kelly is being allowed to present claims based on tolling of the statute of limitations, the district court cannot go forward. Each and every tolling issue is barred by our decision in Kelly III.

Kelly did not bring his action within the time specified in the AEDPA, and in Kelly III we held that he was barred by the statute of limitations, which was not tolled under the facts of his case. That is res judicata on the issue. See Brown v. Felsen, 442 U.S. 127, 131, 99 S. Ct. 2205, 2209, 60 L. Ed. 2d 767 (1979); Americana Fabrics, Inc. v. L. & L. Textiles, Inc., 754 F.2d 1524, 1529

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3. The court ruled on issues arising out of Kelly's conviction and sentence in San Bernardino County, California and the issues arising out of the trial regarding his competence to be executed, which occurred in Marin County, California. Still pending before the California Supreme Court are issues arising out of his conviction and sentence in Riverside County, California. We, however, decline to issue a writ regarding the exhaustion of those issues.

(9th Cir. 1985). Kelly could have presented any and all of his claims for tolling in Kelly III and he cannot escape the bar of the statue of limitations by asserting that he now has new reasons for wanting tolling to apply. See Brown, 442 U.S. at 131, 99 S. Ct. at 2209; American Fabrics, 754 F.2d at 1529. The very assertions Kelly now makes to us were clearly present when we decided Kelly III. The possibility of Kelly's reliance on prior district court orders was mentioned in Judge Tashima's dissent. See Kelly III, 127 F.3d at 788 (Tashima, J. dissenting). It was also raised in Kelly's petition for rehearing in that case. And the State's position in Kelly III was, of course, equally well known to us at the time (and was alluded to by Kelly), as was any alleged uncertainty in the law. Finally, the rather circular argument that counsel must have been incompetent and that Kelly is entitled to tolling because he was incompetent to note the possible incompetence of his counsel has no real merit. In the first place, he was not entitled to competent counsel in his post-conviction proceedings. See Bonin v. Vasquez, 999 F.2d 425, 428-29 (9th Cir. 1993); Harris v. Vasquez, 949 F.2d 1497, 1513-14 & n.13 (9th Cir. 1991). In the second place, Kelly's claim of incompetence was clearly before us at the time, as was the state of the law, and we were fully able to assess those matters when we decided Kelly III. In short, Kelly's aduncous claim in this respect fares no better than his others. The statute of limitations issue has been finally decided against him.

Nor would it help him to suggest that res judicata does not apply to habeas corpus proceedings. His prior cases did not involve true habeas corpus petition proceedings. He never got that far. The statute of limitations bar dropped before he could. So it is now. He could not, and cannot, evade Kelly III by filing a habeas petition and relying on tolling in the face of our statute of limitations holding in that case. Moreover, even if we were to treat the statute of limitations matter in Kelly III

as if it were part of a habeas corpus proceeding for our purposes, a different principle would apply to him. The present statute of limitations matters would be successive uses of habeas corpus and would, themselves, be barred. See Ceja v. Stewart, 134 F.3d 1368, 1369 (9th Cir. 1998); see also Williams v. Calderon, 83 F.3d 281, 286 (9th Cir. 1996). Of course, we should not and do not apply successive petition law because Kelly's problem arose before he crossed the border into habeas corpus territory.

In fine, unless there are some claims within 28 U.S.C. § 2244(d)(1)(B) or (D), as Kelly claims there are, any attempt to bring issues involving Kelly's convictions and sentences to federal court is doomed because Kelly III was not evanescent. It bars Kelly from pursuing petitions which must rely on tolling of the statue of limitations for their validity. In other words, the district court's decision to grant tolling is erroneous as a matter of law, disregards its obligation to follow our prior mandate, will impose improper expenses and delay upon the State, and will be prejudicial in a way that cannot be corrected on appeal because it threatens an untoward interference in orderly state processes. See Bauman v. United States District Court, 557 F.2d 650, 654-55 (9th Cir. 1977).

CONCLUSION

The district court simply misunderstood the purport of our earlier mandate, and that has led it to allow Kelly to again start up his endless delaying tactics. That is not acceptable. See Ramon-Sepulveda v. INS, 824 F.2d 749, 751 (9th Cir. 1987); Brown v. Baden, 815 F.2d 575, 576 (9th Cir. 1987). His claims which would require tolling are barred by the statute of limitations.

Therefore, we order the issuance of a writ of mandamus which directs the United States District Court, Central District of California, to dismiss the purported habeas corpus petitions in cases No. CV 98-2722-TJH and

CV 98-2723-TJH forthwith to the extent that they rely on tolling for their validity.[4] In all other respects the petition is denied.

The petition for writ of mandamus is GRANTED, in part, and DENIED in part. Issuance of the writ is stayed until 5:00 p.m. on June 16, 1998. If neither a petition for rehearing (with or without an en banc suggestion) is filed nor a sua sponte call for an en banc vote is made within that period, the writ shall thereupon issue. If a petition for rehearing (with or without an en banc suggestion) or a sua sponte call is made within that period, the stay shall continue in effect until the conclusion of the process.

The parties shall bear their own costs.

COUNSEL

Harry W. Simon, Deputy Federal Public Defender, Los Angeles, California, for the petitioner.

Keith I. Motley, Supervising Deputy Attorney General, San Diego, California, for the respondent.

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4. This does not preclude proceeding on any proper claims, if any exist. Of course, that includes any proper claim of incompetence to be executed. See Kelly III, 127 F.3d at 787.

Filed June 9, 1998

Calderon v. United States District Court, No. 98-70569

TASHIMA, Circuit Judge, dissenting:

Because the underlying case is an inappropriate candidate for a writ of mandamus and because, in any event, the majority is wrong on the merits, I dissent.

As the majority recognizes, Kelly is entitled to a stay of execution so that the district court may consider his claims under Ford v. Wainwright, 477 U.S. 399 (1986), that he is not competent to be executed and that he was not afforded due process of law in his state court sanity hearing. Given those claims, a stay of execution in this case is inevitable, at least until the district court resolves the Ford claims and the aggrieved party has taken an appeal.[1] Accordingly, even if the district court's ruling that equitable tolling applies in this case is erroneous, the State of California (State) has not been prejudiced in a way that requires mandamus to correct.

The majority, however, reaches out to prejudge a host of issues that do not require decision at this time and makes that judgment on the basis of an incomplete record

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1. In our prior opinion, we noted that "if Kelly's real point is that a presently incompetent person should not be executed, that claim is premature. It can only be brought up if and when an order for his execution issues. In that event, California does recognize that it cannot execute an insane person. It provides a procedure for turning the order of execution aside. Moreover, Kelly could seek relief in the federal courts." Calderon v. United States Dist. Court, 127 F.3d 782, 787 (9th Cir. 1997) (emphasis added and citations omitted) (Kelly III). The Supreme Court has since confirmed that, irrespective of the status of his other claims, Kelly can file a first petition raising his Ford claims. Stewart v. Martinez-Villareal, 118 S. Ct. 1618 (1998). Therefore a stay of execution is mandatory to enable the district court to consider the merits of these claims. Lonchar v. Thomas, 517 U.S. 314, 319-20 (1996).

and without adequate briefing. We do not issue writs of mandamus merely to correct errors that can be reached on appeal. Rather, we require that the party seeking the writ have no other adequate means to attain the relief it desires, and that the petitioner be damaged in a way not correctable on appeal. Bauman v. United States Dist. Court, 557 F.2d 650, 654-55 (9th Cir. 1977). Neither of those factors exists here because our partial writ of mandamus is simply powerless to give the State the relief it desires, namely, a lifting of the stay of execution. See Lonchar v. Thomas, 517 U.S. 314, 319-20 (1996).

But even if mandamus were appropriate in this case, the majority is mistaken on the merits. The majority concludes that our decision in Kelly III, that Kelly's habeas claims are barred by the AEDPA's one-year statute of limitation, "is res judicata on the issue." While giving lip service to the rule that res judicata does not apply to habeas proceedings, the majority rejects this clear rule because of its peculiar interpretation that "[h]is prior cases did not involve true habeas corpus proceedings."

There is no requirement however, that the prior case be a habeas proceeding. The only circuits to rule on the issue have so held. See Boyer v. White, 763 F.2d 1012 (8th Cir. 1985); Heirens v. Mizell, 729 F.2d 449, 456 (7th Cir. 1984). Boyer involved a habeas petition challenging a state conviction and Heirens involved a habeas petition challenging a state denial of parole. In both cases, the state argues that the prisoners' federal habeas petitions were barred by res judicata because the same claims had been raised in prior (Boyer) or contemporaneous (Heirens) federal civil rights action under 42 U.S.C. § 1983. Both the Seventh and Eighth Circuits rejected this argument, reasoning that "a decision in another case is not res judicata as to a habeas proceeding." Heirens, 729 F.2d at 456 (quoting Warren v. McCall, 709 F.2d 1183, 1184 n.4 (7th Cir. 1983)); Boyer, 763 F.2d at 1012 (citing Heirens). Thus, the majority's contrary holding, without any

articulated justification, creates an inter-circuit conflict on this issue.

In McCleskey v. Zant, 499 U.S. 467 (1991), the Court held that a prior rejection of a habeas petition is not res judicata to a subsequent petition. Id. at 480. A fortiori, a prior non-habeas proceeding cannot be res judicata to a later habeas proceeding -- otherwise, what is the point of habeas corpus? The entire goal of a habeas petition is to challenge a prior court's resolution of constitutional claims that were raised before that court. Wainwright v. Sykes, 433 U.S. 72, 87 (1977). In fact, that is the very essence of the exhaustion requirement. If non-habeas proceedings can be res judicata to a subsequent habeas petition, then every habeas petition must fail. Of course, if the majority means to suggest that direct appeals within the state system are not res judicata to subsequent habeas petitions in the federal system, see Brown v. Allen, 344 U.S. 443, 458 (1953), yet federal civil rulings (e.g., Kelly III) do have a res judicata effect on federal habeas petitions, it has cited no legal authority to support that unique proposition and I know of none. Yet, the majority has not even seen fit to request briefing on this novel question of law that it has raised sua sponte. One must ask, why this rush to judgment?

Moreover, it is clear that Kelly III was a habeas proceeding, and thus falls squarely within McCleskey's rejection of res judicata. In Kelly III, we invoked the AEDPA's one-year statute of limitations on habeas petitions to rule that Kelly was no longer entitled to file a habeas petition challenging his convictions and death sentences. 127 F.3d at 785. A statute of limitations, of course, is a defense. And the one-year period the AEDPA is a defense to a petition for habeas corpus. 28 U.S.C. § 2244(d)(1). See also Calderon v. United States Dist. Court (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997) (holding that the AEDPA's one-year limitation period is a traditional statute of limitations), cert. denied, 118 S. Ct.

899 (1998). Therefore, when we invoked the AEDPA's one-year limitations period, we were necessarily denying a writ of habeas corpus, which is exactly the ruling that does not have res judicata effect on a later petition. McCleskey, 499 U.S. at 480.

The majority has confused the procedural posture of our prior case (anticipatory denial of a petition for habeas corpus, instead of denial in the normal course of appellate review) for the substance of our decision. To deny Kelly's habeas petition before he files it is, in the end, to deny Kelly's petition. That is a habeas ruling, and it should not have res judicata effect, even under the majority's unique interpretation of the law. In short, only a perverse reading of the record supports the majority's conclusion that Kelly III was not a habeas corpus proceeding.

The proper analysis of this case, which is the first federal petition Kelly has ever filed, is whether Kelly has "abused the writ." McCleskey, 499 U.S. at 489. And this is a question, in the context of this case, that cannot be answered without a full record and a question that, in any event, should be answered by the district court in the first instance.

At the least, Kelly's present equitable tolling argument is different from the one we rejected in Kelly III. There, we considered only whether Kelly could indefinitely toll the AEDPA's one-year statute of limitations due to his alleged mental incompetency. 127 F.3d at 786-87. The majority did not consider whether tolling would be appropriate for a definite time period because of uncertainty in the law when the AEDPA was enacted, or because Kelly's mental incompetence required some limited, specific amount of extra time in which to file a petition.[2]

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2. The majority also rejects out of hand, and without analysis, Kelly's ineffective assistance of counsel claim. It does not consider

The majority now attempts to broaden Kelly III by saying that some of these issues are foreclosed because they were raised in the Kelly III dissent -- but these claims were clearly not addressed in the majority's opinion. If res judicata applied to this case, then perhaps we would defer not only to the issues actually decided in Kelly III, but also to those that could have been raised or might have been decided by implication. But the question here is, at most, abuse of the writ. I do not see how filing a first petition can ever amount to an abuse of the Great Writ, particularly one that raises legal claims on which there is no controlling authority in this circuit. Instead, I agree with the Eighth Circuit that a first habeas petition cannot be an abuse of the writ, even if it raises claims identical to those in a prior federal case. See Boyer, 763 F.2d at 1012.

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the effect of 21 U.S.C. § 848(q)(4)(B), which entitles a death-row petitioner "[i]n any postconviction proceeding under section 2254 or 2255 of title 28 . . . to the appointment of one or more attorneys." In McFarland v. Scott, 512 U.S. 849 (1994), the Court held that a "postconviction proceeding under section 2254" begins when the petitioner files a motion requesting appointment of counsel, even if no habeas petition has been filed. Id. at 856-57. We did not mention McFarland when we decided in Kelly III that a habeas proceeding does not exist until the habeas petition has been filed, regardless of how many other motions may have been filed. 127 F.3d at 785. That problem aside, McFarland squarely holds that Kelly had a statutory right to counsel beginning at the moment counsel was requested. The Eighth Circuit reasoned that this statutory right to counsel means a lawyer that will "communicate with his or her client." Murray v. Delo, 34 F.3d 1367, 1373 (8th Cir. 1994). Thus, Kelly's alleged mental incompetency may be yet another reason to toll the AEDPA's one-year limitations period, as Kelly's inability to communicate with his own lawyers was surely "a turn of events over which [Kelly] had no control." Beeler, 128 F.3d at 1289. This issue has never been ruled on by any judge and should not be foreclosed by the offhand treatment given to it by the majority.

Kelly III's rush to judgment was a mistake, and the majority today compounds its error. A writ of mandamus is an extraordinary remedy, not only because it requires expedited resolution of difficult questions of law, but also because it shortcuts normal deliberative procedures. As Kelly's current motion for equitable tolling demonstrates, there are a host of arguments that we never addressed in Kelly III, but that could have been raised in the normal process of review, had the record been fully developed, had the lawyers been given more time, and had the district court passed on these issues in the first instance after development of a full evidentiary record.

Unfortunately, rather than realizing its past error and permitting its correction, the majority in a defensive reaction now relies on the dissent in Kelly III to pretend that it "implicitly" must have decided all these questions it refused to address. And it compounds this mistake by ignoring the standards for granting a writ of mandamus[3/] and by formulating and unsound extension of the doctrine of res judicata.

Because the district court should be permitted expeditiously to get on with its task of deciding this difficult case without further interference, I would deny the State's petition for a writ of mandamus. I therefore respectfully dissent.

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3. The majority states in conclusory fashion that the district court's consideration of Kelly's claims in his first petition, except for his "incompetence to be executed" claims, "will be prejudicial in a way that cannot be corrected on appeal because it threatens an untoward interference in orderly state processes." Of course, this contention can be made every time a federal court entertains a first habeas petition of a state prisoner under sentence of death.

APPENDIX 6

APPENDIX 6

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTHUR CALDERON, Warden of
California State Prison at San
Quentin, Petitioner,

v.

THE UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA, Respondent,

v.

HORACE EDWARDS KELLY, Real Party in Interest.

Opinion

No. 98-70569

D.C. Nos. CV-98-02722-TJH, CV-98-02723-TJH

Petition for a Writ of Mandamus to the
United States District Court
for the Central District of California
Terry J. Hatter, Jr., District Judge, Presiding

Argued and Submitted
July 23, 1998--San Francisco, California

Filed December 8, 1998

Before: Procter Hug, Jr., Chief Judge, and James R. Browning, Betty B. Fletcher, Harry Pregerson, Stephen Reinhardt, Cynthia Holcomb Hall, Alex Kozinski, David R. Thompson, Stephen S. Trott, A. Wallace Tashima, and Barry G. Silverman, Circuit Judges.

Opinion by Judge Tashima; Concurrence by Judge Thompson; Concurrence by Judge Silverman; Dissent by Judge Hall

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13507

SUMMARY

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Criminal Law and Procedure/Habeas Corpus

The court of appeals denied a petition for a writ of mandamus. Sitting en banc, the court held that res judicata does not apply to a federal habeas corpus petition.

Real party in interest Horace Kelly was convicted of capital murder in California state court and sentenced to death. In Kelly III, the court of appeals ordered Kelly's federal proceedings dismissed on the ground that they were barred by the statute of limitations prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") for habeas corpus petitions. In so holding, the

court determined that Kelly could not indefinitely toll the statute on the basis of his alleged mental incompetency.

Kelly filed two more federal proceedings in which he sought habeas corpus relief. Kelly's claims included the assertions that he is not competent to be executed, and that he did not receive due process in his state sanity hearing.

California moved to dismiss on the ground that the proceedings contravened the determination of the court of appeals in Kelly III that the statute of limitations barred Kelly from seeking relief by way of federal habeas corpus.

The district court denied the State's motion on the ground that the statute of limitations had been tolled. The State petitioned for a writ of mandamus.

In Kelly IV, a three-judge panel of the court of appeals granted in part the State's second mandamus petition. The court granted en banc review.

[1] Bauman v. United States District Court, 557 F.2d 650 (1977) delineated the five factors that support the issuance of

a writ of mandamus: (1) the party seeking the writ has no other adequate means to attain the relief desired; (2) the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; (5) the district court's order raises new and important problems, or issues of law of first impression.

[2] To satisfy either of the first two factors, a litigant must demonstrate some burden imposed by a clearly erroneous district court order other than mere cost and delay. [3] There is no reason why a first habeas petition in a death penalty case should be a unique exception to the general unwillingness of the court of appeals to grant mandamus merely to avoid the normal cost and delay associated with litigation.

[4] Given the near-prohibition against the filing of successive petitions mandated by the AEDPA, and the irreversible consequences that flow from the rejection of a capital habeas petitioner's first petition, the State's interests in factors one and two are assigned less importance when the court of appeals deals with a first petition from a sentence of death. [5] The first two Bauman factors weighed against the State. Kelly never had a federal court rule on his constitutional claims. It would have been inappropriate to prevent that consideration merely to accommodate the State's desire for a quick execution.

[6] Mandamus would have been particularly inappropriate in this case because a stay of execution was inevitable. Kelly's claim of present incompetence to be executed became ripe and exhausted only in 1998. Kelly's presentation of the claim to the district court was a first petition; under the AEDPA, this claim was not time-barred, and Kelly was therefore entitled to a stay. The prejudice the State sought to avoid could not be avoided.

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[7] The fifth factor was not present because the Ninth Circuit had already confirmed the availability of equitable tolling of the AEDPA's time bar. The district court's

invocation of tolling did not support the existence of the fifth Bauman factor.

[8] Despite disagreement between the district court and the three-judge panel about how broadly to read Kelly III, the fourth factor was not present either. A disagreement about the scope of a prior appellate ruling is not an uncommon occurrence, and does not normally merit correction by mandamus.

[9] Similarities between Kelly III and Kelly IV suggested the applicability of legal doctrines designed to prevent endless litigation of the same claims--law of the case, res judicata, and abuse of the writ. If one of these doctrines were applicable, the clear error inquiry could be resolved. If not, the court of appeals had to determine the timeliness of Kelly's habeas petitions.

[10] Law of the case never prevents an en banc court from disagreeing with the prior decisions of a three-judge panel. Thus, even if Kelly III were the law of the case as to the three-judge panel in Kelly IV, it was not the law of the case as to the en banc court.

[11] The three-judge panel relied on res judicata to bar reconsideration of the effect of the AEDPA's statute of limitations. Res judicata bars reconsideration not only of those questions resolved in a prior case, but also of those that could have been raised and resolved in the prior case. [12] The panel majority's use of res judicata had to be rejected because it contravened the rule that res judicata has no application in habeas corpus. [13] Res judicata does not apply to a habeas corpus petition, regardless of the nature of the prior proceeding.

[14] The rule against applying res judicata in habeas cases

was not abrogated by the AEDPA. The AEDPA merely codi-

fied the abuse-of-the-writ doctrine. [15] Res judicata would render largely superfluous the AEDPA's specific provisions governing successive habeas petitions.

[16] Kelly's habeas petitions were not and could not have been an abuse of the writ because they were the first federal petitions he ever filed. Opposing a mandamus petition is not an adequate substitute for raising every claim that one might prudently raise in a habeas petition. It was the State that sought mandamus and selected the issues to be contested. This reversal of the litigants' positions, combined with the transfer of agenda-setting power to the State, made Kelly's opportunity to respond to the mandamus petition an inadequate substitute for a first habeas petition.

[17] The AEDPA does not apply to cases pending at the time of the statute's enactment. [18] Kelly's case was not pending when the AEDPA was enacted. The one-year statute of limitations therefore applied [19] Kelly III's holding, that a habeas "case" is not pending until the petition has been filed, had to be overruled. [20] The district court proceedings that Kelly filed in 1992 and 1993 were dismissed under the compulsion of the writ of mandamus issued in Kelly III. Thus, the district court's decision to consider Kelly's habeas petitions on the merits was not clear error.

[21] Under the circumstances, one remedy available to Kelly was to move in the district court to set aside the dismissals, and to permit or deem the habeas petitions to

be filed in the earlier cases nunc pro tunc as of the date they were filed in the 1998 cases. Good and just cause existed to set the dismissals aside. [22] In the alternative, it was not clear error for the district court to hold that Kelly's 1998 habeas petitions were not barred by the AEDPA's one-year statute of limitations. The court's finding that the statute of limitations should be equitably tolled was clearly correct.

[23] First, the district court ordered that all other aspects of this case be stayed pending final determination of Kelly's

mental capacity. This stay prevented Kelly's counsel from filing a habeas petition, and justified equitable tolling. [24] Second, Kelly's alleged mental incompetency justified equitable tolling, at least until a reasonable period elapsed after the district court made a competency determination. [25] Third, Kelly had timely habeas proceedings pending at one time. Those proceedings were mistakenly dismissed through no fault of Kelly under compulsion of the writ of mandamus issued in Kelly III. This error presented an independent ground to toll the statute of limitations.

Judge Thompson concurred specially, expressing disagreement with the majority's conclusion that Kelly's alleged mental incompetency tolled the AEDPA's one-year statute of limitations.

Joined by Judge Kozinski, Judge Silverman also concurred specially to criticize the majority's rejection of res judicata in the habeas context.

Judge Hall dissented, stating the view that the AEDPA

barred Kelly from filing a first habeas petition.

COUNSEL

Daniel E. Lungren, Attorney General of California, Keith I. Motley, Supervising Deputy Attorney General, San Diego, California, for the petitioner.

Maria E. Stratton, Federal Public Defender, David W. Fermino, Assistant Federal Public Defender, Los Angeles, California, for the real party in interest.

No appearance for the respondent.

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OPINION

TASHIMA, Circuit Judge:

This case comes to us in an unusual procedural posture, complicated by an atypical history. Real party in interest Horace Edwards Kelly (Kelly) was sentenced to death in two separate cases by the California state courts. See People v. Kelly, 51 Cal.3d 931 (1990), cert. denied, 502 U.S. 842 (1991)(Kelly I); People v. Kelly, 1 Cal.4th 495, cert. denied, 506 U.S. 881 (1992) (Kelly II). For most of the past several years, Kelly's attorneys have been

attempting to determine Kelly's competency to assist them in preparing his first federal habeas corpus petitions. In Calderon v. United States Dist. Court, 127 F.3d 782 (9th Cir. 1997), cert. denied, 118 S. Ct. 1395 (1998) (Kelly III), a three-judge panel granted the petitioner Warden's (State) first petition for a writ of mandamus and preemptively held that Kelly's first habeas petitions -- insofar as they might challenge his convictions and death sentences -- could never be filed because of the time bar of 28 U.S.C. S 2244(d)(1). Kelly, nonetheless, later did file his first petitions. When the district court equitably tolled the time bar of S 2244(d)(1) so that it could reach the merits of Kelly's claims,1 the same three-judge panel granted in part the State's second petition for writ of mandamus. Calderon v. United States Dist. Court, No. 98-70569, slip op. at 5997 (9th Cir. Jun. 9, 1998) (Kelly IV). We granted en banc review.2

The history of this case, combined with its procedural posture, require us to address several issues of concern in habeas corpus law. First, we must clarify whether a writ of mandamus can properly be issued to prevent the consideration of a first habeas petition. Second, we address the holding in Kelly IV, that res judicata applies in the habeas context. Third, we

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1 No hearing on the merits has yet been held.
2 Kelly IV has been withdrawn. Calderon v. United States Dist. Court, No. 98-70569, 1998 WL 351217 (9th Cir. Jun. 26, 1998).

discuss what kinds of legal proceedings qualify as a "case" for purposes of the Supreme Court's holding that the Antiterrorism and Effective Death Penalty Act of 1996

("AEDPA"), Pub. L. No. 104-132, 1996 U.S.C.C.A.N. (110 Stat.) 1214, does not apply to "cases pending" at the time of the statute's enactment. See Lindh v. Murphy, 117 S. Ct. 2059, 2061 (1997). Finally, we address whether Kelly's habeas proceedings, or petitions, were timely commenced.

I. History of the Case

The opinions in Kelly I, Kelly II, Kelly III and Kelly IV fully explain the history of this case, and we summarize it here only briefly. Kelly was convicted and sentenced to death in Riverside County, California, for the murder of Danny O. Kelly I, 51 Cal. 3d at 940. He was also convicted and sentenced to death in San Bernardino County, California, for the murders of Sonia Reed and Ursula Houser. Kelly II, 1 Cal.4th at 511. Each of these death sentences has been treated independently by the State, which is why we refer throughout this opinion to Kelly's first habeas petitions, in the plural.

Following the state court affirmances of his convictions and death sentences, Kelly turned to federal court. In 1992 and 1993, acting on an application for the appointment of counsel to initiate habeas proceedings and for a stay of execution filed by Kelly, the district court stayed Kelly's scheduled executions and appointed counsel to represent him.3 No habeas petitions were filed at that time. On April 24, 1996, Congress enacted the AEDPA, which imposes a one-year statute of limitations on the filing of a habeas corpus petition that challenges a state conviction. 28 U.S.C. S 2244(d)(1). The Supreme Court has held, however, that the AEDPA does not apply to cases that were pending on the AEDPA's effective

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3 This was in accordance with customary practice and Local Rules 26.8.7(b) and (c) of the Central District of

California. See Brown v. Vasquez, 952 F.2d 1164, 1165 (9th Cir. 1991).

date, i.e., any case pending on April 24, 1996. See Lindh, 117 S. Ct. at 2061; see also Jeffries v. Wood, 114 F.3d 1484, 1494 (9th Cir.) (en banc), cert. denied, 118 S. Ct. 586 (1997).

From 1992 to 1997, Kelly's proceedings remained in the district court. During this period, Kelly did not file a petition for habeas corpus. On September 18, 1997, a three-judge panel of this court granted the State's first petition for a writ of mandamus and ordered the dismissal of Kelly's proceedings. See Kelly III, 127 F.3d at 787. The panel majority reasoned that there was no point to the proceedings because any habeas petition that Kelly might eventually file would be time-barred under the AEDPA. The panel majority first noted that under Lindh, the AEDPA does not apply to cases pending on April 24, 1996, but, applying existing circuit precedent, the panel majority concluded that a habeas case is "pending" only when an actual petition for habeas corpus has been filed -- and Kelly had not yet filed his petitions. He had merely requested the appointment of counsel to prepare and file his petitions. Second, the panel majority rejected Kelly's argument in favor of equitable tolling of S 2244(d)(1)'s one-year statute of limitations. Third, the panel majority acknowledged that the one-year limitations period would not bar Kelly's claim under Ford v. Wainwright, 477 U.S. 399 (1986), that he is currently incompetent to be executed, but it found that claim to be premature for federal review. Kelly III, 127 F.3d at 787. Thus, the writ of mandamus was granted. The district court, as it was ordered to do, then vacated the stay and dismissed the proceedings.

The state courts then set new execution dates for Kelly and the State petitioned the state trial court to determine Kelly's present competence to be executed. A divided jury found that Kelly was sane. Kelly then filed two federal habeas petitions which are the subject of this mandamus petition. These petitions raised the Ford claim and also raised numerous challenges to Kelly's Riverside and San Bernardino convictions and death sentences. The district court held that the one-year

limitations period of the AEDPA was tolled; consequently, that none of Kelly's claims was time-barred. This order prompted the State to file a second petition for a writ of mandamus. The same three-judge panel that heard Kelly III again granted the writ. See Kelly IV, slip op. at 5994. In the panel majority's view, Kelly III had resolved the question of the applicability of the AEDPA's statute of limitations and was res judicata to any later reconsideration of that issue. Id. at 5995. Accordingly, Kelly IV ordered the dismissal of all claims, except Kelly's Ford claim, and ordered the stay of execution to be vacated to the extent that it was based on Kelly's non-Ford claims. Id. at 5997 & n.4.

We then granted en banc review of Kelly IV.

II. The Writ of Mandamus

The role of the court of appeals in this case is strongly constrained by the fact that we are considering a petition for a writ of mandamus and not reviewing a final judgment. Normally, in an appeal, we receive a case after the district court has resolved every claim presented, after the parties have had the opportunity to raise every

argument they choose, and after the facts have been fully developed. A petition for mandamus, however, is an original proceeding and, thus, is different from the normal appellate process in all of those respects. These differences become especially significant in death penalty cases. We do not know whether Kelly's habeas petitions have merit; we lack the benefit of the historical hindsight that we usually possess when we review a case after the facts have been developed; and the briefing before us has necessarily been limited to those issues raised by the State in its petition for mandamus.

[1] Because of the difficult position in which a mandamus petition places the court of appeals, we have repeatedly characterized mandamus as an "extraordinary" or "drastic" remedy. E.g., Calderon v. United States Dist. Court (Gordon),

107 F.3d 756, 761 (9th Cir.), cert. denied, 118 S. Ct. 265 (1997); Armster v. United States Dist. Court, 792 F.2d 1423, 1431 (9th Cir. 1986). The Supreme Court has admonished that mandamus must not become a substitute for the normal appellate process. Kerr v. United States District Court, 426 U.S. 394, 402 (1976); Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953). To provide guidance for when mandamus may be permissible, we have adopted a five-part test. In Bauman v. United States Dist. Court, 557 F.2d 650 (9th Cir. 1977), we delineated the five factors that support the issuance of a writ of mandamus:

> (1)The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires.

> (2) The petitioner will be damaged or prejudiced in a way that is not correctable on appeal . . . .
> (3) The district court's order is clearly erroneous as a matter of law.
>
> (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.
>
> (5) The district court's order raises new and important problems, or issues of law of first impression.

Id. at 654-55 (citations omitted).

We have repeatedly employed the five Bauman factors in mandamus cases, e.g., Taiwan v. United States Dist. Court, 128 F.3d 712, 717 (9th Cir. 1997); McDaniel v. United States Dist. Court, 127 F.3d 886, 888 (9th Cir. 1997), although we have never foreclosed the possibility that other factors might be relevant in an exceptional case. See Calderon v. United States Dist. Court (Hayes), 103 F.3d 72, 74 (9th Cir. 1996),

cert. denied, 117 S. Ct. 2532 (1997). In general, we are guided by the Bauman factors, and they should be weighed together, as is appropriate, based on the facts of the individual case. Star Editorial, Inc. v. United States Dist. Court, 7 F.3d 856, 859 (9th Cir. 1993). Except for supervisory mandamus cases, the absence of factor three -- clear error as a matter of law -- will always defeat a petition for mandamus. Calderon v. United States Dist. Court (Taylor), 134 F.3d 981, 984 (9th Cir.), cert. denied, 67 U.S.L.W. 3204 (U.S. Oct. 5, 1998) (No. 97-1841); Taiwan, 128 F.3d at 717; Executive Software No. Am., Inc.

v. United States Dist. Court, 24 F.3d 1545, 1551 (9th Cir. 1994). The other factors may be more or less relevant, depending on the precise claims at issue, but we have noted that factors one and two usually travel together, Bauman, 557 F.2d at 654, while factors four and five seldom do. Admiral Ins. Co. v. United States Dist. Court, 881 F.2d 1486, 1491 (9th Cir. 1989).

Here, we face a petition for mandamus that asks us to order the dismissal of Kelly's first habeas petitions, including almost all the constitutional claims therein, before the districtcourt can consider any of those claims on the merits. As explained below, we find that all five factors counsel against the issuance of mandamus; accordingly, we deny the petition.

A. Factors One and Two: Other adequate means for relief and non-correctable prejudice.

Because these factors are similar, we consider them together. When we say that a litigant has no adequate means for relief other than mandamus, or that he or she will be prejudiced in a way not correctable on appeal, we do not mean that the litigant has been forced by an erroneous ruling of the district court to suffer unnecessary cost and delay. Mortgages, Inc. v. United States Dist. Court, 934 F.2d 209, 211 (9th Cir. 1991); In re Sugar Antitrust Litig., 559 F.2d 481, 484 & n.1 (9th Cir. 1977). That happens every single time a litigant loses a summary judgment motion that he or she should have won,

every time a district court mistakenly thinks federal jurisdiction exists when it does not, and every time a meritorious motion for judgment as a matter of law is

denied. Undoubtedly, the cost and delay occasioned by such erroneous rulings, in the aggregate, are quite significant and can be quite burdensome to the individual litigant. If such harm could support mandamus, however, then mandamus would no longer be an extraordinary remedy and we will have effectively abandoned our tradition against piecemeal appeals.

[2] Thus, in order to satisfy either of the first two factors, a litigant must demonstrate some burden imposed by a clearly erroneous district court order, other than the mere cost and delay that are the regrettable, yet normal, features of our imperfect legal system. For example, these factors could be satisfied if the litigant's claim will obviously be moot by the time an appeal is possible, e.g., Medhekar v. United States Dist. Court, 99 F.3d 325, 326-27 (9th Cir. 1996), or when the person affected by the district court's order will not have the ability to appeal. E.g., Oregonian Publ'g Co. v. United States Dist. Court, 920 F.2d 1462, 1465 (9th Cir. 1990). But, in general, the mere annoyance and cost of having to litigate will not support mandamus. Mortgages, Inc., 934 F.2d at 211.

[3] We see no reason why a first habeas petition in a death penalty case should be a unique exception to our general unwillingness to grant mandamus merely to avoid the normal cost and delay associated with litigation. Now that Congress has enacted a statute of limitations for the filing of habeas petitions, see 28 U.S.C. S 2244(d)(1), and given our holding that this limitations period can be equitably tolled in the proper circumstances, see Calderon v. United States Dist. Court (Beeler), 128 F.3d 1283, 1288-89 (9th Cir. 1997), cert. denied, 118 S. Ct. 1389 (1998), there will undoubtedly be a number of cases in which the putative habeas petitioner's ability to qualify for equitable tolling will be in doubt. The inevitable prejudice

that will accrue to the State in such cases is that executions will sometimes be delayed because the dis-

trict court mistakenly tolled the one-year limitations period nd proceeded to consider the petitioner's claims on the merits, when it should not have done so. This kind of delay is going to happen often enough that, if this circumstance were sufficient to support the issuance of a writ of mandamus, the writ would no longer be an extraordinary remedy. It would become all too commonplace and almost routine in death penalty cases.4

[4] We acknowledge that the prejudice to the State stemming from a delayed execution is different in character from the prejudice to a litigant in, for example, a trademark, a product liability or an air crash case, who is erroneously forced to endure a trial when he or she should have prevailed on summary judgment. On the other hand, however, the interest of the capital habeas petitioner in having his first habeas petition heard completely and fully is also different in kind. Given the near-prohibition against the filing of successive petitions now mandated by the AEDPA, see 28 U.S.C. S 2244(b), and the irreversible consequences that flow from the rejection of a capital habeas petitioner's first petition, we are constrained to assign less importance to the State's interests in Bauman factors one and two when we deal with a first petition from a sentence of death. McDaniel, 127 F.3d at 889 ("[W]hile the State probably cannot correct on appeal any negative effects it sustains as a result of compliance with the district court's . . . order, this factor carries little weight compared with the needs of an incarcerated capital habeas petitioner .. . .").
Indeed, the Supreme Court has stressed that a capital

habeas petitioner is entitled to a full consideration of all of his or her claims in his or her first petition before a stay of execution

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4 At issue in this case is the district court's denial of the State's Rule 12(b)(6) motion to dismiss on statute of limitations grounds. There is no reason why this motion to dismiss should be treated differently, i.e., reviewed by mandamus rather than on appeal from a final judgment, than the dozens of 12(b)(6) rulings that district courts in this circuit make every day.

can be lifted. Lonchar v. Thomas, 517 U.S. 314, 319-20 (1996). Lonchar supports our reluctance to truncate the district court's consideration of a capital petitioner's first habeas petition by piecemeal review of selected issues by way of mandamus.

[5] Thus, we find that the first two Bauman factors weigh against the State. Kelly has never had a federal court rule on his constitutional claims stemming from his convictions and death sentences. It would be inappropriate for us to prevent that consideration merely to accommodate the State's desire for a quick execution.

[6] Indeed, mandamus would be particularly inappropriate in this case because a stay of execution is inevitable. Kelly's claim of present incompetence to be executed became ripe and exhausted only in 1998. Under Stewart v. Martinez-Villareal, 118 S. Ct. 1618 (1998), Kelly's presentation of the Ford claim to the district court is a first petition; under the AEDPA, this claim is clearly not time-barred; and under Lonchar, Kelly is therefore entitled to a stay. Thus, the prejudice that the State seeks

to avoid cannot be avoided. A delay in Kelly's execution is inevitable. To be sure, the extent of this delay may depend on whether the district court considers only Kelly's Ford claim, or whether it considers all of Kelly's claims. At this point, however, the special need for mandamus is so vitiated, because the writ cannot really give the State the relief it desires, that factors one and two weigh strongly against mandamus.

B. Factors Four and Five:
Oft-repeated error and new questions of law.

[7] The fourth and fifth Bauman factors are the opposite sides of the same coin, Admiral Ins., 881 F.2d at 1491, but it is certainly possible that, as here, neither of them might exist in a particular case. The fifth factor -- the existence of a new and important question of law -- is not present because this

court's decision in Beeler (which was decided prior to Kelly III) had already confirmed the availability of equitable tolling of the AEDPA's time bar. Thus, the district court's invocation of tolling in this case is merely the application of Beeler to a particular set of facts. It does not support the existence of the fifth Bauman factor.

[8] The fourth factor is not present either, despite the disagreement between the district court and the three-judge panel about how broadly to read the panel's opinion in Kelly III. The district court apparently took Kelly III to foreclose only those grounds for tolling actually discussed in Kelly III, while the panel majority gave Kelly III a much broader reading. See Kelly IV, slip op. at 5997. A disagreement about the scope of a prior

appellate ruling is not an uncommon occurrence in a hierarchical judicial system, and it does not normally merit correction by mandamus. If such a disagreement happened repeatedly, we might label it an "oft-repeated error" or a "persistent disregard of the federal rules," Bauman, 557 F.2d at 655, thereby justifying mandamus. But that has not happened in these cases.

C. Factor Three: Clear error as a matter of law.5

We have reserved this Bauman factor for last because it is the most complex. A majority of the three-judge panel found clear error because, in its view, Kelly III flatly precluded reconsideration of the AEDPA's time bar and the question of equitable tolling. See Kelly IV, slip op. at 5995.

[9] While we disagree with the panel majority that Kelly III

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5 In order to decide whether "clear error as a matter of law" exists, we must first examine what the law is, before deciding whether the district court clearly departed from it. See, e.g., Beeler, 128 F.3d at 1288 ("The district court's interpretation of AEDPA's limitations period was not, however, clearly erroneous. It was, rather, clearly correct."); Portillo v. United States Dist. Court, 15 F.3d 819, 822 (9th Cir. 1994).

has this preclusive effect, we do note that Kelly IV looks a lot like Kelly III: It has the same parties; the same facts; several of the same issues; and, until we granted rehearing en banc, the same judges. These similarities between Kelly III and Kelly IV suggest the possible applicability of one

or more of an array of legal doctrines that are designed to prevent endless litigation of the same claims -- specifically, law of the case, res judicata, and abuse of the writ. Obviously, if we found one of these doctrines applicable, that could resolve our clear error inquiry. If not, we must then proceed to determine the timeliness of Kelly's habeas petitions.

1. Law of the Case

Kelly suggests that law of the case is the appropriate framework to decide whether Kelly III precludes the reconsideration of equitable tolling in Kelly IV. He argues that Kelly III lacks this preclusive effect because in Kelly IV he has raised new grounds for equitable tolling, grounds that were not raised or considered in Kelly III. Kelly then cites the familiar rule that law of the case prevents reconsideration only of those issues expressly resolved, or necessarily resolved by implication, in the prior decision. See Milgard Tempering, Inc. v. Selas Corp., 902 F.2d 703, 715 (9th Cir. 1990).

[10] We can dispense with law of the case as an impediment to considering the timeliness of Kelly's first petitions for one simple reason. Law of the case never prevents an en banc court from disagreeing with the prior decisions of a three-judge panel. Jeffries, 114 F.3d at 1492; Watkins v. United States Army, 875 F.2d 699, 704 n.8 (9th Cir. 1989) (en banc). Thus, even if Kelly III were law of the case as to the three-judge panel in Kelly IV, it is not law of the case as to the en banc court. Accordingly, we need not consider whether Kelly III and Kelly IV are truly the same "case" for purposes of law of the case, nor need we decide what issues Kelly III expressly resolved or resolved by necessary implication. The law of the

case established by a three-judge panel simply does not bind the en banc court.

2. Res Judicata

[11] The three-judge panel in this case relied on res judicata to bar reconsideration of the effect of the AEDPA's statute of limitations. See Kelly IV, slip op. at 5995. The panel majority noted that res judicata bars the reconsideration not only of those questions resolved in a prior case, but also of those that could have been raised and resolved in the prior case. Id. Thus, the panel majority was unmoved by Kelly's argument that he was now raising different grounds to support the application of equitable tolling from those considered in Kelly III. From the panel majority's perspective, that was irrelevant, since Kelly concededly could have raised those grounds in the prior mandamus case.

[12] We reject the panel majority's use of res judicata because it contravenes the longstanding rule that res judicata has no application in habeas corpus. The entire point of a habeas petition that challenges a state conviction is to relitigate issues that were raised in the state case and resolved against the petitioner. Wainwright v. Sykes, 433 U.S. 72, 87 (1977).6 Obviously, then, res judicata, in the traditional sense of that doctrine, cannot apply in habeas corpus; otherwise, nearly every habeas petition would be barred by the original trial. See Brown v. Allen, 344 U.S. 443, 458 (1953) (holding that state proceedings are not res judicata to federal habeas cases).

The Supreme Court has confirmed that even a first habeas petition is not res judicata to subsequent petitions. McClesky

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6 In fact, under the "exhaustion" requirement, a habeas petitioner must "afford the State a full and fair opportunity to address and resolve the claim on the merits." Keeney v. Tamayo-Reyes, 504 U.S. 1, 10 (1992) (citation omitted).

v. Zant, 499 U.S. 467, 479 (1991). Rather, federal courts have created a doctrine known as "abuse of the writ " that serves as a substitute for res judicata by limiting the availability of successive habeas petitions when a prior one has been denied. Id. at 480-88. But the Court has been very clear that abuse of the writ is a substitute for res judicata, and that res judicata, strictly speaking, does not attach to the denial of a first habeas petition. Id. at 479-88.

[13] If we characterize Kelly III as a habeas proceeding, then McClesky squarely forecloses any possibility that res judicata could apply to this case. The panel majority, however, preferred to characterize Kelly III as something else (what exactly it was, the panel majority did not say), reasoning that it could not be a habeas proceeding because Kelly had never filed a habeas petition. See Kelly IV, slip op. at 599. While that characterization of Kelly III is debatable, see Kelly IV, slip op. at 6000-01 (Tashima, J., dissenting), we need not struggle to characterize Kelly III. What matters is that this case is a habeas proceeding. McClesky categorically rejected res judicata from a first federal habeas petition to a second; thus, if even those potentially identical cases cannot trigger res judicata, it

follows that nothing else can. We join the Seventh and Eighth Circuits in holding that res judicata does not apply to a petition for habeas corpus, regardless of the nature of the prior proceeding. See Boyer v. White, 763 F.2d 1012 (8th Cir. 1985); Heirens v. Mizell, 729 F.2d 449, 456 (7th Cir. 1984).

[14] We also reject the State's argument that the traditional rule against applying res judicata in habeas cases has somehow been abrogated by the AEDPA. The State seizes on a part of one sentence in Felker v. Turpin, 116 S. Ct. 2333 (1996), in which the Supreme Court described one effect of the AEDPA: "The new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.'" Id. at 2340. Because the State omits every word after "rule" when

it quotes from Felker in its brief, it generates the illusion that Felker welcomed res judicata into habeas law. But once we read the entire sentence, we see that the Court was stating merely that the AEDPA statutorily codified the abuse of the writ doctrine, and it used the words "modified res judicata rule" as a shorthand description of that doctrine.

[15] Indeed, even after the AEDPA, it is still true that federal habeas relief exists in order to relitigate claims that were previously decided in state court, so it is quite fanciful to suggest that the AEDPA sub silentio introduced res judicata into habeas law. Further, the AEDPA includes specific provisions to govern successive habeas petitions, see 28 U.S.C. S 2244(b), and res judicata would render those provisions largely superfluous. We

conclude that even after the AEDPA, the rule is as it has always been: Res judicata does not apply to habeas cases.

3. Abuse of the Writ

Having rejected law of the case and res judicata, we turn to the last doctrine that might have prevented the district court from reconsidering Kelly III's holding that Kelly is timebarred from challenging his state convictions and death sentences in federal court: Abuse of the writ. Generally, this doctrine forbids the reconsideration of claims that were or could have been raised in a prior habeas petition. McClesky, 499 U.S. at 489. Abuse of the writ evolved as a judicially created equitable doctrine, but it is now codified by the AEDPA. Felker, 116 S. Ct. at 2340; 28 U.S.C. S 2244(b).

[16] Kelly's present habeas petitions are not, and cannot be, an abuse of the writ because they are the first federal petitions he has ever filed. Boyer, 763 F.2d at 1012. We realize that in opposing the State's petition for mandamus in Kelly III, Kelly theoretically could have raised every possible argument against holding his petitions time-barred. But we do not think that Kelly's failure to present all possible grounds for relief in

that defensive posture transforms his later habeas petitions into an abuse of the writ. The reason why successive petitions are often deemed abusive is that the first petition provided an adequate opportunity for the petitioner to raise all of his claims, and the petitioner simply chose not to take advantage of that opportunity. McClesky, 499 U.S. at 493. This case is different because opposing a petition for a writ of mandamus is not an

adequate substitute for raising every claim that one might prudently raise in a habeas petition. It was the State that sought mandamus and that set the agenda, i.e., selected the issues to be contested, before the court of appeals. We think this reversal of the litigants' positions, combined with the transfer of agenda-setting power to the State, made Kelly's opportunity to respond to the petition for a writ of mandamus an inadequate substitute for a first habeas petition. Accordingly, Kelly III does not turn Kelly's first habeas petitions in Kelly IV into an abuse of the writ.

4. Timeliness

[17] Having concluded that Kelly III does not preclude reconsideration of the application of the AEDPA's one-year statute of limitations, we now turn to that issue. The AEDPA does not apply to "cases pending" at the time of the statute's enactment. Lindh, 117 S. Ct. at 2061; Jeffries, 114 F.3d at 1494. In Beeler, we held that a habeas case was not "pending" merely because a petition for the appointment of counsel to prepare and file a habeas petition had been filed. 128 F.3d at 1287 n.3. Rather, Beeler held that a case is pending within the meaning of Lindh only when a petition for a writ of habeas corpus has been filed. Id.

Beeler acknowledged some tension between its holding and the Supreme Court's decision in McFarland v. Scott, 512 U.S. 849 (1994). McFarland held that for purposes of 21 U.S.C. S 848(q)(4)(B), which provides for the appointment of counsel for capital defendants in post-conviction proceedings, a "post conviction proceeding" is pending when a request for

the appointment of counsel has been made. Id. at 856. Beeler limited McFarland's broad conception of a proceeding to 21 U.S.C. S 848(q)(4)(B), and it held that for purposes of the AEDPA (and consequently Lindh), a case begins only with the filing of a petition for habeas corpus. 128 F.3d at 1287 n.3.

[18] It was Beeler that initiated Kelly III and Kelly IV's struggle with equitable tolling. Given Beeler, it was clear that Kelly's case was not pending when the AEDPA was enacted; therefore, the one-year statute of limitations applied to this case. Kelly III correctly noted that in light of Beeler, Kelly's hopes for federal habeas relief depended on equitable tolling, at least for his non-Ford claims. See Kelly III, 127 F.3d at 785.

Recently, however, the Supreme Court decided Hohn v. United States, 118 S. Ct. 1969 (1998), a decision that has vitiated Beeler's holding. Hohn's narrow holding was that the Supreme Court has jurisdiction to review decisions of the courts of appeals denying applications for certificates of appealability under 28 U.S.C. S 2253(c). Id. at 1971. But the Court's reasoning was somewhat broader. The Court based its decision on 28 U.S.C. S 1254, which states that "Cases in the courts of appeals may be reviewed by the Supreme Court" by several methods, including certiorari. Asked whether an application for a certificate of appealability constituted a "case," the Court unhesitatingly answered yes:

> There can be little doubt that Hohn's application for a certificate of appealability constitutes a case under S 1254(1). As we have noted, "[t]he words 'case' and 'cause' are constantly used as synonyms in statutes . . ., each meaning a proceeding in court, a suit, or action." Blyew v. United States, 13 Wall. 581, 595 (1871). The dispute over Hohn's entitle-

> ment to a certificate falls within this definition. It is a proceeding seeking relief for an immediate and
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> redressable injury, i.e., wrongful detention in violation of the Constitution. There is adversity as well as the other requisite qualities of a "case" as the term is used in both Article III of the Constitution and the statute here under consideration.

Id. at 1972. Of particular relevance to Beeler's holding that a petition for the appointment of counsel and a motion for a stay of execution do not start a habeas case is the following passage from Hohn:

> We further disagree with the contention . . . that a request to proceed before a court of appeals should be regarded as a threshold inquiry separate from the merits which, if denied, prevents the case from ever being in the court of appeals. Precedent forecloses this argument. In Ex Parte Quirin, 317 U.S. 1 (1942), we confronted the analogous question whether a request for leave to file a petition for a writ of habeas corpus was a case in a district court . . . . We held the request for leave constituted a case in the district court over which the court of appeals could assert jurisdiction, even though the district court had denied the request. We reasoned, "[p]resentation of the petition for judicial action is the institution of a suit. Hence the denial by the district court of leave to file the petitions in these causes was the judicial determination of a case or controversy . . . ."

Id. at 1974-75.

[19] In the wake of Hohn, we must overrule Beeler and Kelly III's holding that a habeas corpus "case" is not pending until the habeas petition itself has been filed. Hohn's holding, as well as its reliance on Ex Parte Quirin that a threshold request for leave to file a petition for habeas corpus commences the habeas "case," is simply irreconciliable with

Beeler and Kelly III. Like a request for leave to file a habeas petition, a petition for the appointment of counsel to prepare and file a petition for a writ of habeas corpus, accompanied by a motion for a stay of execution under McFarland, is a threshold action that presents a "case" to the district court. By analogy to Hohn, it follows that a petition for appointment of counsel under McFarland creates a pending habeas case.7 Accordingly, we overrule those portions of Beeler and Kelly III that held that a habeas corpus case is pending only when the habeas petition itself has been filed. A petition for the appointment of counsel to prepare and file a habeas petition, coupled with a motion for a stay of execution, also suffices.

[20] Given this reading of Hohn and our partial overruling of Beeler and our overruling of Kelly III, it is clear that the AEDPA, including its statute of limitations, does not apply to the district court proceedings that Kelly filed in 1992 and 1993, i.e., cases No. CV 92-5420 TJH and No. CV 93-2951

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7 The dissent attempts to distinguish Hohn on the ground that, because the appointment of counsel is "mandatory" and "a stay of execution will usually be granted," the

"adversity" required by Hohn is missing. The attempt is misguided. First, the State could challenge whether the putative petitioner is "financially unable to obtain adequate representation," as required by 21 U.S.C. S 848(q)(4)(B) to be eligible for the appointment of counsel, an issue which would require ajudication. Second, the grant or denial of a stay of execution under 28 U.S.C. S 2251 is addressed to the discretion of the district court, again, requiring judicial resolution of the issue. While it may be correct that a stay of execution will usually be granted, it is not a ministerial or mandatory act. See McFarland, 512 U.S. at 858 ("Section 2251 does not mandate the entry of a stay but dedicates the exercise of stay jurisdiction to the sound discretion of a federal court."). These circumstances meet the adversity requirement of Hohn. Indeed, Hohn makes no exception where the government acquiesces in the motion, relying instead on the adjudicative nature of the proceedings, rather than the actual course of litigation. See Hohn, 118 S. Ct. at 1976 ("It would have made no difference had the Government declined to oppose Hohn's application for a certificate of appealability. . . . [P]etitions for certiorari to this Court are often met with silence or even acquiescence; yet no one would suggest this deprives the petitions of the adversity needed to constitute a case.").

TJH. Those cases were dismissed by the district court under the compulsion of the writ of mandamus issued in Kelly III, which we have now overruled. Thus, in retrospect, the district court's decision to consider Kelly's habeas petitions on the merits is not clear error.8

[21] Under the circumstances of this case, one remedy

available to Kelly is to move in the district court to set aside those dismissals under Fed. R. Civ. P. 60(b)(6), 9 and to permit or deem the habeas petitions filed in district court cases No. CV 98-2722 TJH and No. CV 98-2723 TJH to be filed in the earlier-filed cases nunc pro tunc as of the date they were filed in the 1998 cases. See United States v. Alpine Land & Reser-voir, Co., 984 F.2d 1047, 1049 (9th Cir. 1993) (Rule 60(b)(6) applies "where extraordinary circumstances prevented a party from taking timely action"). Although such a motion is addressed to the discretion of the district court, id., because the original proceedings were dismissed under the compulsion of Kelly III and our mistaken holding in footnote 3 of Beeler, which we have now overruled, good and just cause would exist to set those dismissals aside.10

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8 Ironically, in its order that was the subject of Kelly III, the district court originally (and, in hindsight, correctly) held that the AEDPA did not apply to Kelly's petitions. See Kelly III, 127 F.3d at 783.

9 The rule provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment . . . for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b)(6).

10 Since the dismissals were "based" on Kelly III, which has now been overruled, these circumstances also provide sufficient grounds under Fed. R. Civ. P. 60(b)(5) (which applies when a "a prior judgment upon which it [the dismissal] is based has been reversed or otherwise vacated") to set aside those dismissals. See Tomlin v. McDaniel, 865 F.2d 209, 211 (9th Cir. 1989).

5. Tolling

[22] In the alternative, we hold that it was not clear error as a matter of law for the district court to hold that Kelly's habeas petitions, filed in 1998, were not barred by the AEDPA's one-year statute of limitations. Indeed, the district court's finding that the statute of limitations should be equitably tolled under Beeler was clearly correct.

In Beeler, we held that the time bar of 28 U.S.C. S 2244(d)(1) can be tolled "if 'extraordinary circumstances' beyond a prisoner's control make it impossible to file a petition on time." 128 F.3d at 1288-89 (citing Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1997)).

In its order of June 3, 1998, the district court "Ordered that the motions for equitable tolling be, and hereby is, Granted based on prior counsels' reliance on this Court's order staying all proceedings other than the issue of Petitioner's sanity." There are several reasons why this order is clearly correct, rather than clearly erroneous.

[23] First, on January 9, 1995, as part of its order that Kelly be mentally evaluated, the district court ordered "that all other aspects of this case be, and hereby are, Stayed pending final determination by this Court of the Petitioner's mental capacity to proceed." The only reasonable reading of this order was that it prohibited Kelly's attorneys from filing a habeas petition, which is how the district court itself construed it. Explaining its decision to grant equitable tolling in Kelly IV, the district court noted: "[T]his court indeed ordered a stay of all the proceedings other than the issue of the petitioner's sanity . . . . Reasonably, it could not be expected that counsel

would go forward [with filing the habeas petitions]." See also Kelly III, 127 F.3d at 788 ("Few things put the doing of an act so 'clearly beyond the prisoner's control,' as Beeler requires, as a court order prohibiting the doing of that act.") (Tashima, J., dissenting). This stay of the proceedings prevented Kelly's

counsel from filing a habeas petition and, in itself, justifies equitable tolling.

[24] Second, Kelly's alleged mental incompetency also justifies equitable tolling, at least until a reasonable period of time has elapsed after the district court makes a competency determination. The record discloses that Kelly has been having serious mental problems for many years. See id., at 788 & n.1. In fact, the State agreed that a hearing was necessary to determine his present competency. See id. at 788-89.11 Under 21 U.S.C. S 848(q)(4)(B), Kelly has a statutory right to counsel in his federal habeas proceeding. That right contemplates effective communication between lawyer and client. Murray v. Delo, 34 F.3d 1367, 1373 (8th Cir. 1994) ("We do not think Congress had in mind a lawyer who would not communicate with his or her client, or who would file a petition without consultation with or authorization from the client."). A putative habeas petitioner's mental incompetency -- a condition that is, obviously, an extraordinary circumstance beyond the prisoner's control -- renders the petitioner unable to assist his attorney in the preparation of a habeas petition. Such a condition could eviscerate the statutory right to counsel. Where, as here, there is a threshold showing of mental incompetency, a sufficient showing has been made for equitably tolling the statute of limitations, and we reject

Kelly III's holding to the contrary. When a putative habeas petitioner's mental competency is at issue, and the record discloses a genuine basis for concern, it is appropriate to toll the AEDPA's time bar until a reasonable period after the district court makes a competency determination.

[25] Third, Kelly had timely, i.e., not subject to the AEDPA's statute of limitations, habeas proceedings pending at one time. As set forth in Part II.C.4, above, those proceedings were mistakenly dismissed, through no fault of Kelly,

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11 Because of the writ of mandamus issued in Kelly III, the scheduled hearing on mental competency never took place.

under the compulsion of the writ of mandamus issued in Kelly III. This judicial error presents an independent ground to toll the statute of limitations, for it was our mistake that deprived Kelly of the opportunity to have his first federal habeas petitions considered on the merits.

For all of these reasons, the district court correctly held that Kelly's 1998 habeas petitions, i.e., those filed in cases No. CV 98-2722 TJH and No. CV 98-2723 TJH, were entitled to the benefit of the equitable tolling of the statute of limitations. Cf. Herring v. FDIC, 82 F.3d 284 (9th Cir.) ("We may affirm on any basis the record supports, including one the district court did not reach."), cert. denied, 117 S. Ct. 581 (1996).

In sum, the State has not demonstrated that the challenged orders of the district court are clearly erroneous as a matter of law.

III. Conclusion

We hold that Kelly's original habeas proceedings, filed in 1992 and 1993, were pending at the time the AEDPA was enacted. Therefore, the AEDPA, including S 2244(d)(1)'s statute of limitations, does not apply to Kelly's original federal habeas proceedings. In the alternative, we also hold that Kelly's 1998 habeas petitions are not barred by the AEDPA's statute of limitations because the district court correctly ruled that these petitions were entitled to the benefit of the equitable tolling of the statute of limitations. The State has failed to demonstrate that any of the five Bauman factors that are needed to support issuance of the writ of mandamus exists in this case. Accordingly,

The State's petition for a writ of mandamus is DENIED.

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THOMPSON, Circuit Judge, Specially Concurring.

I concur in the majority opinion except for the second and third reasons given for applying equitable tolling in Part II C 5.

I agree with the majority that because the district court's June 3, 1998 order stayed all proceedings other than the issue of Kelly's sanity, that order prevented Kelly's counsel from filing a habeas petition, and equitable tolling applies.

I do not agree, however, that Kelly's alleged mental incompetency equitably tolled the AEDPA's one-year statute of limitations, and I would not reach the question whether equitable tolling applies as a result of the dismissal of Kelly's habeas proceedings under the compulsion of the writ of mandamus issued in Kelly III.

SILVERMAN, Circuit Judge, with whom KOZINSKI, Circuit Judge, joins, Specially Concurring.

I agree with the majority that the AEDPA's statute of limitations never should have been applied to Kelly because, under the analysis of Hohn v. United States, 118 S.Ct. 1969 (1998), his habeas case was pending prior to the enactment of the AEDPA.

However, I write separately to express my disagreement with the majority's unnecessary and wholesale rejection of res judicata in the habeas context. Both Congress and the Supreme Court have made it clear that in the absence of unusual circumstances, habeas petitioners cannot continue to litigate issues that have been or could have been litigated already in habeas proceedings. When Congress amended S 2244 of the habeas corpus statute in 1966, it specifically stated that "the purpose of these new subsections is to add to section 2244 of title 28, United States Code, provisions for a

qualified application of the doctrine of res judicata." S.Rep.No. 89-1797, at 2 (1966) (emphasis added). The Supreme Court has agreed. See Calderon v. Thompson, 118 S.Ct. 1489, 1500-1501 (1998). See also Schlup v. Delo,

513 U.S. 298, 318-19 (1995) (successive petition standard is a "qualified application of res judicata"); Felker v. Turpin, 116 S.Ct. 2333, 2340 (1996) ("the new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ'"); McCleskey v. Zant, 499 U.S. 467, 486 (1991) ("subparagraph (b) [to 28 U.S.C. S 2244] establishes a qualified application of res judicata").

By definition, a petition for writ of habeas corpus is a collateral attack on a final judgment. It is in that sense that res judicata does not apply to habeas corpus proceedings. That is a far cry from a rule of res judicata that prevents a habeas petitioner who has already litigated X in habeas proceeding from relitigating X in new habeas proceedings without good excuse. This case illustrates the problem. In 1992, Kelly started his first habeas proceeding by requesting the appointment of counsel. In 1997, after the AEDPA statute of limitations had run, the state moved to dismiss the proceedings on the grounds that no petition for writ of habeas corpus had ever been filed and that the time to file had run out. Kelly responded to the motion to dismiss with two arguments: First, that the AEDPA's statute of limitations did not apply to him; and second, that even if it did, the statute of limitations was equitably tolled by his incompetency. At no time did Kelly also claim equitable tolling based on his reliance on Judge Hatter's order. In fact, when this case was argued to the Kelly III panel, this revealing colloquy occurred:

> Judge Tashima: Suppose, suppose, we don't agree that this is a pending case. In other words, that the AEDPA does apply to this case. Your position then is what?

> Mr. Neuhoff, Kelly's counsel: Well, at that point, this Court is entitled to ... if there is any ground appearing in the record from which the district court's decision and its exercise of disretion can be upheld then the court can deny the writ [of mandamus sought by the state] on that basis and another ground here is equitable tolling.
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> * * *
>
> Judge Tashima: What appears in the record to support that?
>
> Mr. Neuhoff: What appears in the record is that the district court has before it prima facie evidence, at least, that Mr. Kelly is: (a) incompetentto proceed and assist counsel in his habeas proceedings and (b) is incompetent to be executed.
>
> * * *1

Conspicuously absent was anything from Kelly's counsel along the lines of "... and (c) Kelly or his lawyers relied in good faith on Judge Hatter's order." Judge Hatter's order, which looms so large now, wasn't even mentioned.

The upshot of that oral argument was the decision in Kelly III holding that Kelly's incompetency did not constitute grounds for equitable tolling. After Kelly III was decided, the

1. Transcript of argument of Calderon v. U.S.D.C. (Kelly), ("Kelly III"), September 5, 1997 at 13.

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state again moved the district court to dismiss Kelly's habeas proceedings as time-barred. This time, for the first time, Kelly raised Judge Hatter's order as a basis for equitable tolling.

One can only wonder how many additional theories of equitable tolling Kelly had in reserve. One must also wonder how this court could possibly permit him to litigate one of his grounds for equitable tolling and then, after he loses, to raise additional grounds for equitable tolling of which he was previously aware. The record in this case is devoid of any explanation of why Kelly's counsel did not raise the currently proffered ground for equitable tolling earlier, either in response to the state's motion to dismiss in the district court or in connection with the petition for writ of mandamus in this court in Kelly III. As a result, in my view, he is barred from belatedly raising it now unless his default is excused by a showing of cause and prejudice or manifest injustice.

The problem raised by the Supreme Court's decision in Hohn is a different matter. "[A] court should not reopen issues decided in earlier stages of the same litigation. The doctrine does not apply if the court is convinced that [its prior decision] is clearly erroneous and would work a manifest injustice." Agostini v. Felton, 117 S.Ct. 1997 (1997) (citations and internal quotation marks omitted). The Supreme Court's decision in Hohn, handed down after both Kelly III and Kelly IV were decided, demonstrates that Kelly should not have been deemed barred from filing his petition for writ of habeas corpus by

the AEDPA statute of limitations in the first place. It would be unjust to persist in that error.

HALL, Circuit Judge, Dissenting.

The majority opinion expresses clear disdain for the fact that the AEDPA's statute of limitations bars Kelly from filing

a first habeas petition. Unfortunately, the statute of limitations is the law.

First, the majority finds that all five factors enumerated in Bauman v. United States Dist. Ct., 557 F.2d 650, 654-55 (9th Cir. 1977), counsel against the issuance of mandamus. However, this is no ordinary mandamus action. Kelly IV was simply an action to enforce the mandate of Kelly III, a decision the District Court chose to ignore. It is hornbook law that mandamus "is available to a party who has prevailed in this Court if the lower court does not proceed to execute the mandate, or disobeys and mistakes its meaning." Vendo Co. v. Lektro-Vend Corp., 434 U.S. 425, 427 (1978); see also Citizens National Trust & Savings Bank of Los Angeles v. United States Dist. Ct., 215 F.2d 799, 800 (9th Cir. 1954) (holding that a petition for mandamus is appropriate where the District Court "violated the plain provisions of our mandate").

The real issue is whether the District Court did or did not violate this court's mandate. While the majority deems this issue "most complex," the simple fact is that the District

Court allowed Kelly to file a habeas petition after this court held that such a petition was time-barred. I can conceive of no clearer violation of this court's mandate. The majority concludes that Kelly should not be precluded from filing a habeas petition because res judicata does not apply to habeas petitions, but as the panel decision made clear, "[Kelly's] prior cases did not involve true habeas corpus petition proceedings. He never got that far." Calderon v. United States Dist. Ct. (Kelly), No. 98-70569, slip op. at 5996 (9th Cir. June 9, 1998) ("Kelly IV"). Allowing Kelly to file a habeas petition after this court held he could not flagrantly undermines any respect for the finality of this court's judgments.

The majority also makes much of the fact, in its discussion of "abuse of the writ," that it was the state that selected the issues to be decided in Kelly III's mandamus proceeding. This fact is wholly irrelevant. Res judicata "prevents litigation of

all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." Americana Fabrics, Inc. v. L & L Textiles, Inc., 754 F.2d 1524, 1529 (9th Cir. 1985) (emphasis added). There is no indication that any of the defenses to the statute of limitations were unavailable at the time of Kelly III. Kelly cannot and should not be allowed to "sandbag" the judicial process by withholding defenses and presenting them seriatim whenever he requires a delay of his execution.

While I dissent from the entire opinion as it stands, I wish to point out that the portion of the opinion from which I dissent above is in fact dictum. The majority does not use

its carefully crafted (but misguided) interpretation of res judicata and abuse of the writ in order to provide Kelly with a new basis for equitable tolling of the statute of limitations. Instead, the majority simply goes on to hold that the statute of limitations does not apply to Kelly at all. This holding does not depend upon the application of res judicata or abuse of the writ but upon the majority's misapplication of a recent Supreme Court case. The majority employs an overbroad interpretation of the Supreme Court's opinion in Hohn v. United States, 118 S. Ct. 1969 (1998), to overrule Kelly IV, Kelly III, and ultimately a portion of Calderon v. United States Dist. Court (Beeler), 128 F.3d 1283, 1287 n.3 (9th Cir. 1997), cert. denied, 118 S. Ct. 899, 1389 (1998). At the heart of the majority's error is its unreflective act of equating the word "case" as used in Hohn with the word "case" as used in Beeler; the words may appear the same, but their meanings are vastly different.

In Hohn, the Supreme Court decided whether a court of appeals decision denying an application for a certificate of appealability under 28 U.S.C. S 1253(c) constituted a "case" for purposes of Supreme Court jurisdiction under 28 U.S.C. 1254 and the "case or controversy" requirement of Article III.

See 118 S. Ct. at 1972. In Beeler, on the other hand, this court decided that a request for appointment of counsel and stay of execution did not constitute a habeas "case" for purposes of the AEDPA's statute of limitations. Hohn was therefore using the word "case" to interpret whether the Supreme Court had jurisdiction while Beeler was using the word "case" to interpret whether a statute of limitations had run. This distinction is crucial.

Beeler expressly held (a holding that the en banc majority does not disturb) that the AEDPA's statute of limitations was not jurisdictional. 128 F.3d at 1287-89. Indeed, the availability of equitable tolling, which the majority recognizes, depends upon the fact that the AEDPA's statute of limitations is not jurisdictional. See id. Thus, Hohn's use of the word "case" cannot overrule Beeler's use of the word "case" because the two courts were using this word in completely different contexts to mean completely different things.

Even if Hohn and Beeler were using the word "case" to mean the exact same thing (which they were not), the cases are so factually distinguishable as to belie the argument that one "has vitiated" the other. In Hohn, the Supreme Court merely stated that a habeas corpus petition that had been ruled upon in the District Court but denied a certificate of appealability remained a case for purposes of a petition for certiorari. The case before us deals with a request for counsel and a stay of execution where no habeas petition had been filed, and thus there was nothing that could "remain" a case. 1

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1 The majority, in a judicial sleight-of-hand that also undermines the AEDPA's statute of limitations, holds that this court may deem the habeas petitions filed after the AEDPA's effective date as having been filed nunc pro tunc before that date in order to avoid reaching the issue of equitable tolling. See n.7, supra. This does not change the fact, however, that when the request for counsel and stay of execution were made, no habeas petition had been filed.

The majority overlooks another underlying rationale in Hohn: that a certificate of appealability involves adversity. See 118 S. Ct. at 1972. By overlooking this rationale, the majority can in conclusory fashion state that a petition for appointment of counsel accompanied by a motion for a stay of execution is a "case," even though indigents have the mandatory right to counsel under 21 U.S.C. S 848(q)(4)(B), see McFarland v. Scott, 512 U.S. 849, 854 (1994), and a stay of execution will usually be granted to allow counsel "meaningfully to research and present a defendant's habeas claims." Id. at 858. Because the request for counsel and a stay did not involve true adversary proceedings, I would hold that, even if Hohn's definition of a "case" applied to the proceedings before us (which it does not), no such case had been initiated before the statute of limitations expired.

For the reasons above, I respectfully dissent.

APPENDIX 7

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1.) Section 101 of the Antiterrorism and Effective Death Penalty Act of 1996, appearing in Chapter 153 of Title 28 of United States Code § 2244, provides in relevant part:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A)the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B)the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United State is removed, if the applicant was prevented from filing by such State action;

(C)the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D)the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2)The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall

not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(1).

2.) Title 21 of the U.S.C. § 848(q)(4) provides in relevant part:

(B)In any post conviction proceeding under 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

21 U.S.C. § 848(B).

3.) Commencement of Action, Rules of Civil Procedure, Rule 3.

A civil action is commenced by filing a complaint with the court.